

John Ballinger 50
J. H. Beale

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894

No. 443

RAY CONSOLIDATED COPPER COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 12, 1894

(**50,408**)

p. 24

(30,408)

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[fol. 1] IN COURT OF CLAIMS OF THE UNITED STATES

No. B-160

RAY CONSOLIDATED COPPER COMPANY, a Corporation,
vs.

THE UNITED STATES.

I. PETITION AND AMENDED PETITION

On August 2, 1922, the plaintiff filed its original petition. Subsequently, to wit, on November 19, 1923, by leave of court, the plaintiff filed its amended petition. Said amended petition is as follows:

II. AMENDED PETITION—Filed November 19, 1923

To the Court of Claims of the United States and to the Honorable . the Judges thereof :

The above named claimant, by Root, Clark, Buckner & Howland, its attorneys, by this, its petition, respectfully shows:

1. The claimant at all times hereinafter mentioned was and is a domestic corporation organized and existing under the laws of the State of Maine, engaged in the business of mining, and having an office at 25 Broad Street, Borough of Manhattan, in the City of New York, New York.

2. The claimant has a just claim for the refund of \$21,240.30 as the still unreturned portion of a larger sum paid by it on June 5, 1922, under duress and written protest, to the Collector of Internal [fol. 2] Revenue for the Second New York District at New York City, New York, as an additional capital stock tax wrongfully assessed by the Commissioner of Internal Revenue of the United States for the period ending June 30, 1921, with interest thereon. The total amount so originally assessed and paid was \$69,798.07, of which \$48,447.77 was subsequently refunded by the United States. The provision of law under which such wrongful assessment was made and upon which the petitioner claims such refund is Section 1000 of Title X of the Act of February 24, 1919, entitled "An Act to Provide Revenue and for other Purposes" and known as the Revenue Act of 1918.

3. Pursuant to Section 3173 Revised Statutes and other Acts of Congress provided, the claimant, on July 30, 1920, and on Official Form 707, made to the Commissioner of Internal Revenue its return for the year ending June 30, 1921, for the special tax imposed by Section 1000, Title X, of the Revenue Act of 1918. Said return

showed that the fair average value of its capital stock for the preceding year ending June 30, 1920, was \$34,803,608.99, and that the tax due thereon was \$34,798.

4. The special tax leviable upon a domestic corporation under said Section 1000, Title X, was measured by "the fair average value of its capital stock for the preceding year ending June 30th." The capital stock of petitioner was all common stock. On December 31, 1919, there were outstanding 1,577,179 shares thereof, having a par value of \$10 per share.

Said stock was at all of said times listed on the New York Stock [fol. 3] Exchange. During each year, including 1919 and 1920, there were a large number of sales of such stock on said Exchange. During the calendar year 1919, 537,938 shares of such stock were bought and sold in bona fide transactions upon the New York Stock Exchange, such transactions occurring in practically every business day. The average of the twelve monthly mean prices realized on such sales and purchases in each of the twelve months of the year 1919 was \$22.067 per share.

5. The value (\$34,803,608.99) so reported by the claimant in its return on said Official Form 707 as the fair average value of its capital stock was determined in conformity with the instructions of the Commissioner of Internal Revenue contained in said Official Form 707, as of the fiscal year ending December 31, 1919. It was determined by multiplying the number of shares outstanding during said fiscal year, the calendar year 1919, by the average market price per share during 1919, and was based directly upon said sales and purchases during that year, and such value was the fair average value of the capital stock of the claimant for the fiscal year preceding June 30, 1920.

6. Upon said return, a special tax was assessed against claimant under said Section 1000, Title X, in the sum of \$34,798. The claimant duly paid that tax.

7. On February 23, 1922, the Commissioner of Internal Revenue notified the claimant that an additional assessment of capital stock tax, amounting to \$69,107, would be listed against it for the year [fol. 4] ending June 30, 1921, and that such assessment was arrived at by taking as the "fair average value" of the capital stock of the claimant the alleged value of the corporate assets, including in such alleged value as the value of the mining property of the claimant the fair market value of such property on March 1, 1913, as determined for depletion purposes under the Revenue Acts of 1916 and 1917 by the Commissioner of Internal Revenue, with allowance for depletion sustained after March 1, 1913.

8. Following such notice and on March 28, 1922, the said collector made demand upon claimant for the payment of \$69,107 as an additional capital stock tax for the year ending June 30, 1921. In assessing such additional tax, the Commissioner of Internal Revenue determined that the fair value of the claimant's capital stock, on the

basis so used by him, was \$103,910,409.07. That value was determined without regard to the value of the claimant's capital stock as evidenced by said market transactions hereinabove set forth.

For the reasons hereinbefore set forth, such valuation of \$103,910,000 was erroneous, against the requirements of said Section 1000, and excessive; as for like reasons was also said assessment of additional capital stock tax in the sum of \$69,107.

9. On April 6, 1922, the claimant, pursuant to Section 1316 of said Revenue Act of 1918, amending Section 3220 of the Revised Statutes, and pursuant to other acts of Congress provided, duly filed [fol. 5] with the said Collector a claim for abatement of said additional assessment of capital stock tax, amounting to \$69,107. Such claim for abatement was rejected by the Commissioner of Internal Revenue under date of May 27, 1922.

10. On June 2, 1922, the said Collector made a second demand for the payment of said additional assessment of capital stock tax for the year ending June 30, 1921, amounting to \$69,107, and also made demand for interest on said sum at the rate of 1% per month for one month, amounting to \$691.07. On June 5, 1922, the claimant, under threat by the said Collector of seizure and sale of its property if it failed to make such payments and in the belief that such threat would be carried out, paid to the said Collector at New York City, New York, the said sums of \$69,107 and \$691.07. The total sum so paid was \$69,798.07. Said payments were made under duress and protest and, at the time of making such payments, the claimant filed with the said Collector a written protest against such additional assessment and against the payment thereof and of interest thereon. A copy of such protest, marked Exhibit "A," is hereto attached and made a part hereof.

11. On information and belief, the claimant avers that the total sum of \$69,798.07 so paid by it under protest to the said Collector was thereafter by him turned over and deposited into the Treasury of the United States of America as in the usual course of his official business.

12. On June 14, 1922, pursuant to the acts of Congress referred to [fol. 6] in Paragraph 9 hereof, the claimant duly filed with the said Collector a claim for refund of said payment. A copy of such claim for refund, hereto attached and marked Exhibit "B," is made a part of this petition. On June 29, 1922, such claim for refund was rejected in full by the Commissioner of Internal Revenue.

13. On November 9, 1923 the claimant received a written "notice of adjustment of claim for refund" signed by a Deputy Commissioner of Internal Revenue stating that its said claim for refund of \$69,798.07 had been reconsidered and that \$48,557.77 thereof had been allowed and \$21,240.30 thereof again rejected. On November 9, 1923 the claimant received a check for said amount of \$48,557.77 together with interest thereon amounting to \$1,245.87. Said notice stated that the refund was based upon an estimate that the value of

the physical property of the claimant as of December 31, 1919 was \$32,282,993.56 and that by substituting this valuation for the valuation previously used in determining the additional tax, the total value of the assets exceeded the liabilities by \$55,833,541.66. This amount was adopted as the "fair value of capital stock" and a refund of \$48,077 of the additional tax with \$480.70 interest paid thereon was approved.

14. By reason of said refund the amount, the recovery of which is sought by the claimant in this petition, was reduced to \$21,240.30. The whole of said sum of \$21,240.30 is now wrongfully and unlawfully retained and withheld from the claimant without its consent and against its will by the United States of America.

[fol. 7] 15. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments. The claimant has at all times borne true allegiance to the Government of the United States. It has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. It is and always has been the sole and absolute owner of the claim here presented. It has made no transfer or assignment of said claim or of any part thereof or of any interest therein. It is justly entitled to the amount claimed from the United States of America, after allowing all just credits and setoffs.

16. The claimant believes the facts as herein above stated to be true.

Wherefore, the claimant prays judgment against the United States of America upon the facts and law for \$21,240.30, together with interest thereon from June 5, 1922 and its reasonable costs and disbursements herein.

Ray Consolidated Copper Company, Claimant, by Sherwood Aldrich, As Its President. Root, Clark, Buckner & Howland, Attorneys for Claimant.

Office and Post Office Address, No. 31 Nassau Street, Borough of Manhattan, City of New York, New York.

[fol. 8] Jurat showing the foregoing was duly sworn to by Sherwood Aldrich omitted in printing.

[fol. 9]

EXHIBIT "A" TO PETITION

June 5, 1922.

To the Hon. Andrew W. Mellon, Secretary of the Treasury, the Hon D. H. Blair, Commissioner of Internal Revenue, and the Hon. Frank K. Bowers, Collector of Internal Revenue for the Second District of New York:

SIRS: Under date of March 28, 1922, Honorable Frank K. Bowers, Collector of Internal Revenue for the Second District of New York,

sent to Ray Consolidated Copper Company, a notice and demand for payment of \$69,107 additional capital stock tax for the twelve month period ending June 30, 1921. Within ten days from March 28, 1922, Ray Consolidated Copper Company duly filed a bona fide claim for the abatement of said assessment, which was accepted by said Collector. Under date of May 27, 1922, said Company was duly notified by the Commissioner of Internal Revenue of the rejection of said claim for abatement. On June 2, 1922, said Company received the enclosed second notice and demand for tax on form 1-21, demanding payment of said tax of \$69,107 within ten days, together with interest thereon at the rate of 1% per month beginning April 7, 1922, one month's interest being \$691.07.

Pursuant to said enclosed second notice and demand received from said Collector, the undersigned, Ray Consolidated Copper Company, herewith under duress and with protest, and to avoid threat-[fol. 10]ened penalties and threatened seizure of its property, makes payment to said Collector of the sum of \$69,107, heretofore and now represented by him to be lawfully required and demanded of said corporation and to be due to the United States under and in accordance with Section 1000 of Title X of the Revenue Act of 1918, being the Act of Congress approved February 24, 1919, as a tax upon or in respect of the fair average value of the capital stock of said Company for the year ending June 30, 1921, and to have been lawfully assessed against said corporation as such tax, together with interest thereon for one month at the rate of one per cent per month, amounting to \$691.07, as demanded by said second notice and demand.

Said payment is made under protest and duress:

(1) Said corporation hereby protests against being required to pay said sum and each and every part thereof, on the ground that the same has been erroneously and illegally assessed, and that the demand for such payment and the enforcement thereof are invalid and unlawful and not warranted by any valid statute, and deprive the undersigned of rights secured to it by the Constitution and laws of the United States.

Without in any way limiting said general protest, further protest against the assessment and against the demand for the payment of said tax and the enforcement thereof is hereby made upon the following grounds:

(2) The undersigned protests that said additional assessment and said demand for payment of said tax are erroneous and unlawful in that they are based upon a misinterpretation and misapplication [fol. 11] of Section 1000 of Title X of the Revenue Act of 1918. That Section provides in part:

"(a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of Section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent

to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year ending June thirtieth as is in excess of \$5,000. In estimating the value of capital stock, the surplus and undivided profits shall be included; * * *

By the provisions of this Section, the tax imposed is measured by the aggregate value of the shares of stock of the corporation. Such value may be established by proof of sales of such shares in reasonable volume during the preceding year. The undersigned has heretofore duly filed a return on official form 707 for the taxable period ending June 30, 1921, setting forth the aggregate fair average value of its shares of stock, such value being established by a large number of bona fide sales of such stock, and has heretofore duly paid the capital stock tax upon such fair average value. Applying the basis prescribed by the statute, no further tax for the period ending June 30, 1921, is legally due from the undersigned.

The Commissioner of Internal Revenue, however, has construed the statutory language quoted above to mean that the capital stock tax upon mining companies under said Section 1000 should be based upon a valuation of the net assets of such corporations rather than upon a valuation of the shares of stock of such corporations. [fol. 12] Said Commissioner has heretofore notified this Company that the additional tax now demanded was determined by him to be due by measuring the total tax due for such period by the net fair value of the assets of said corporation. (Letter to Ray Consolidated Copper Company, dated February 23, 1922, signed by McKenzie Moss, Deputy Commissioner, containing symbols CST—2 N. Y.—46—NNM). Such additional tax and each and every part thereof is therefore based wholly upon a misinterpretation and misapplication of Section 1000 of Title X of the Revenue Act of 1918, and is therefore erroneous and unlawful and is not warranted by the language of said statute.

(3) The undersigned protests that said assessment is erroneous and unlawful in that Section 1000 of Title X of the Revenue Act of 1918, as interpreted and applied by the Commissioner of Internal Revenue in this case, is unconstitutional. Said Section provides in part as follows:

"That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of Section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year ending June thirtieth, as is in excess of \$5,000. In estimating the value of capital stock, the surplus and undivided profits shall be included; * * *

In applying said statute in this case, the said Commissioner of Internal Revenue has assessed a tax against the undersigned based [fol. 13] upon a valuation of its net assets. Such a tax is a direct

[fol. 14]

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

Important

File with Collector of Internal
Revenue where assessment was
made. Not acceptable unless
completely filled in.

STATE OF NEW YORK, } ss:
County of New York,

EXHIBIT "B" TO PETITION

Claim for

- Abatement of tax assessed
- Credit against outstanding assessments
- Refund of taxes illegally collected
- Refund of amounts paid for stamps
used in error or excess

Notice to Collector

Collector must indicate in block
above the kind of claim, except in
Income Tax cases.

Collector's Notation
District
Account number
Date received
Stamp here
Collector of Internal Revenue

Type
or
Print

Ray Consolidated Copper Company,
(Name of taxpayer or purchaser of stamps.)
25 Broad Street,
(Residence—give street and number as well as city or town and State.)
New York City, N. Y.
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Mining.
2. Character of assessment or tax. Additional Capital Stock Tax
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased, \$69,107 as tax; \$691.07 interest..... \$69,798.07
4. Reduction of Tax Liability requested (Income and Profits Tax)
5. Amount to be abated.....
6. Amount to be refunded (or such greater amount as is legally refundable) with interest from June 5, 1922..... \$69,798.07
7. Dates of payment (See Collector's receipts or indorsements of canceled checks) June 5, 1922
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed. Second District, New York.
9. District in which unpaid assessment appears.....
10. Amount of overpayment claimed as credit..... \$.....
11. Unpaid assessment against which credit is asked; period from..... to..... \$.....

Period	Year
From: July 1,	1920
To: June 30,	1921

Deponent verily believes that this application should be allowed for the following reasons:

[See attached statement.]

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 14th day of June, 1922. Signed:

[Notarial Seal.]

R. B. HINDLE,
Notary Public, etc.
(Title.)

C. V. JENKINS,
Asst. Treasurer
Ray Consolidated Copper Co.

tax upon the real and personal property of this corporation within the meaning of Article X, Section 9 of the Constitution of the United States, and is therefore unconstitutional and invalid because not laid in proportion to population as required by that Section.

(4) The undersigned hereby protests against being required to pay the said sum of \$69,798.07, and each and every part thereof, and represents and declares that such payment is made under duress and only to avoid penalties and forfeitures, the enforcement of which has been and is now threatened by representatives of the United States, and the seizure of its property which is now threatened by representatives of the United States. And notice is hereby given that at such time and in such manner as may be found advisable, appropriate proceedings, including any action at law or in equity that may be deemed suitable, will be taken to recover the said sum of \$69,798.07, or any part thereof, and to preserve and protect all the rights and interests of said corporation.

Dated, New York, N. Y., June 5, 1922.

Ray Consolidated Copper Company, by C. V. Jenkins, Assistant Treasurer.

(Here follows Exhibit "B" to Petition, marked side folio page 14)

[fol. 15] Refund is claimed of \$69,798.07 paid (as set forth in the Company's letter of June 5, 1922, to which reference is hereby made) by Ray Consolidated Copper Company under protest and duress on June 5, 1922, as additional capital stock tax for the period ending June 30, 1921, together with interest.

Facts

Ray Consolidated Copper Company is a domestic corporation engaged in mining copper. On or about July 31, 1920, it filed its capital stock tax return on official Form 707, showing that the fair average value of its capital stock for the preceding year ended June 30th, 1920, as demonstrated by bona fide sales of its shares of stock in large volume was \$34,803,608.99. Thereafter Ray Consolidated Copper Company duly paid the tax of \$34,798, based upon that valuation. The Company had outstanding on December 31, 1919, 1,577,179 shares of common stock with a par value of \$10 per share, making an aggregate par value of \$15,771,790. This stock for many years has been listed on the New York and Boston Stock Exchanges and a large amount of stock has been bought and sold during each year. During 1919, 537,938 shares of the Company's stock were bought and sold on the New York Stock Exchange. The value of \$34,803,608.99 reported by the Company was based upon actual sales of such stock made on the New York Stock Exchange during 1919 at an average price of \$22.0677 per share. These sales were set forth in detail in Exhibit B of Form 707.

On February 23, 1922, the Commissioner of Internal Revenue [fol. 16] notified the Company that an additional assessment of capital stock tax, amounting to \$69,107, would be made against it for the year ended June 30, 1921, and that this assessment was determined by basing the capital stock tax of claimant upon a valuation of the corporate assets, using as the value of the mining property the fair market value of such property on March 1, 1913, as determined for depletion purposes by the Commissioner of Internal Revenue, with allowance for depletion sustained. Demand for payment of this additional tax was made on March 28, 1922, a claim for abatement was duly filed within ten days and was rejected by the Commissioner under date of May 27, 1922. The additional assessment was thereupon duly paid under protest, with interest, on June 5, 1922.

Printed and typewritten briefs have heretofore been filed with the Bureau of Internal Revenue opposing the assessment of capital stock tax on the basis of such a valuation of the assets of the Company, to which reference is made for a full statement of taxpayer's position.

The Statute

Section 1000 of the Revenue Act of 1918 reads, in part, as follows:

"That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of Section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30, as is in excess of [fol. 17] \$5,000. In estimating the value of capital stock, the surplus and undivided profits shall be included;

(2) Every foreign corporation shall pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to \$1 for each \$1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June 30."

The Commissioner's Ruling

In making this additional assessment the Commissioner has based the capital stock tax upon a valuation of the assets of the corporation and has used as the value of the Company's mining property the fair market value of such property as of March 1, 1913, as determined by the Income Tax Unit. The Commissioner's letter states:

"You contend that the fair value of your capital stock is represented by the average prices on shares of stock established through market trading, whereas this office holds that, in the case of your Company, the fair value of the capital stock considered as a whole is not materially less than the net fair value of the assets. By using the values established for depletion purposes in connection

with Federal taxes, the net worth reflected by the excess of assets over liabilities is \$103,910,000, which is considered indicative of the fair value of the capital stock for the purpose of this tax. It is understood you contended for a valuation of the mineral land as of March 1, 1913, less depletion sustained, equal to or in excess of the values used in the above computation. Furthermore, it is not shown that there has been any material change from such value."

[fol. 18]

Position of the Company

The Company contends that (1) the term "fair average value of * * * capital stock" means fair average value of the aggregate shares of stock and not the value of the corporate assets; and that (2) the amount of the tax is to be ascertained by valuing the shares in the same manner in which shares are valued by the Department in other connections, the evidence of value preferred being the record of representative sales of shares when available; and that (3) in the case of a mining company the value of its mining property, determined as of an earlier date for depletion deduction, bears no necessary or fixed relation to the average present value of its shares of stock.

This position is more fully developed by the proposition stated below.

I

The shares of capital stock of a corporation and the assets of the corporation are entirely different things.

The simple distinction between the assets of a corporation and the shares of capital stock is well settled by court decisions. The courts recognize that these things have different values and the Department has adopted this principle in valuing assets for depletion purposes. For capital stock tax purposes, however, the Department apparently asserts the right to base the capital stock tax in any particular case either upon asset values or upon share values, whichever may be higher. It is clear that the use of one or the other [fol. 19] of these two different things must be held to be the basis of this tax and that the same words in the same statute cannot be treated as meaning two different things. The Department must in all cases value the same thing. Under this statute, it is clear that the tax is based on share values.

II

"Capital Stock" as used in Section 1000 means shares of stock.

It is clear from court decisions that in any particular case the meaning of the words "capital stock" is determined by the context.

A. The language of the statute shows that share value is intended.

The words "capital stock" in Subdivision 1 of Section 1000 must be contrasted with the words "capital employed" used in Subdivision 2. Both phrases do not mean corporate assets. The first means shares, the latter assets. Share values can be averaged, as the statute requires; assets values ordinarily cannot be averaged. A valuation of shares gives full effect to the sentence—

"In estimating the value of capital stock the surplus and undivided profits shall be included."

Such a valuation is "estimated," since it requires an exercise of judgment, and it gives full effect and consideration to surplus and undivided profits. A valuation of assets, including unrealized appreciation, is not based upon surplus and undivided profits, for they do [fol. 20] not include such appreciation. The fact that the value must be estimated is no indication that the statute must be construed so as to make the estimate as difficult as possible.

B. The history of the statute shows that it was not the intention of Congress to base this tax upon asset values.

In the Congressional debate upon the 1916 Act, containing the first capital stock tax, it was expressly stated that the tax was based on the market value of stocks. The Congress which adopted the Revenue Act of 1918 specifically refused to approve a Senate amendment changing the basis of the tax from "capital stock" to "net assets." The same Congress in this same Act refused to adopt a valuation of assets as the basis for invested capital (the basis of the important excess profits tax), because it regarded such a valuation of all corporate property as impracticable and impossible. It is clear Congress did not intend to require such a valuation of assets as the basis for the much less important capital stock tax.

Central Union Trust Co. vs. Edwards (unreported, U. S. D. C., So. Dist. N. Y.).

C. Measured by the value of shares of stock the capital stock tax is constitutional; measured by the value of assets it is unconstitutional.

A tax on corporate assets, while other assets are not taxed, is discriminatory, unequal and not based upon any reasonable classification, and hence takes property without due process of law. A tax upon corporate assets is a direct tax and constitutional only if [fol. 21] levied according to population and apportioned among the several states. This statute, as applied by the Commissioner, is, therefore, unconstitutional.

An excise tax measured by the value of shares of stock, a distinctive corporate attribute, is constitutional. A statute is always construed, if possible, so as to avoid raising constitutional questions, or in favor of rather than against its constitutionality.

D. The manifest intent of Congress was to adopt a measure of the capital stock tax which was readily ascertainable. The words "capital stock" should therefore be held to refer to shares rather than to assets, because shares are often bought and sold and can be satisfactorily valued far more readily than corporate assets, which are seldom bought and sold.

Shares of stock are far easier to value than corporate assets, because shares of representative corporations are regularly and frequently bought and sold in large numbers and can, therefore, be valued with relative ease and certainty. Corporate assets, however, are rarely dealt in and any correct annual valuation of all corporate assets is impracticable, if not impossible. The fact that judgment must be used in "estimating" value is no indication that the statute requires the exceedingly difficult valuation of assets to be made rather than the relatively simple valuation of shares. Congress intended to adopt a measure of the tax which was readily ascertainable by the taxpayer and by the Government. A correct valuation of all corporate assets annually or oftener would be impracticable and the expense of attempting to make and check such a valuation would be prohibitive.

[fol. 22]

III

The primary method for determining share value is by market transactions.

Once it is determined that the value of the shares of the corporation is the thing to be ascertained, the valuation is a relatively easy task. In other connections the Department holds that market quotations of sales of stock regularly bought and sold on the market are ordinarily the best evidence obtainable of its value. In a case such as this where a large volume of the Company's stock was freely bought and sold on the New York Stock Exchange during the year ending June 30, 1920, such sales are the best evidence of value and satisfactorily establish the fair average value of the shares of stock. Any valuation of the mineral property of the corporation as of March 1, 1913, has little bearing on the value of the shares of stock in 1920.

Refund of the additional assessment and interest, amounting to \$69,798.07, is, therefore, claimed for the reason that the statutory measure of the capital stock tax is a valuation of corporate shares rather than corporate assets; that the fair average value of the shares of this Company, based upon bona fide sales of its stock in reasonable volume, was correctly stated on its return and should not be modified by any consideration of 1913 asset value; that a capital stock tax measured by a valuation of corporate assets is unconstitutional as discriminatory and as an unapportioned direct tax; and that the entire additional assessment was erroneous and unlawful.

[fol. 23]

III. GENERAL TRAVERSE

No demurrer, plea, answer, counterclaim, set off, claim of damages, demand, or defense in the premises, having been entered on the part

of the defendant, a general traverse is entered as provided by Rule 34.

IV. ARGUMENT AND SUBMISSION OF CASE

On April 9, 1924, this case was argued and submitted on merits by Messrs. William Wallace, Jr., and Arthur A. Ballantine, for plaintiff, and by Messrs. Fred K. Dyar and Forest D. Siefkin, for the defendant.

[fol. 24] V. FINDINGS OF FACT, CONCLUSION OF LAW, AND OPINION OF THE COURT BY BOOTH, J.—Entered May 19, 1924

This case having been submitted to the court upon a stipulation of facts signed by Root, Clark, Buckner, and Howland, attorneys for plaintiff, on behalf of plaintiff, and Robert H. Lovett, Assistant Attorney General, on behalf of the United States, the court, upon said stipulation, makes the following

FINDINGS OF FACT

I

The Ray Consolidated Copper Company, the plaintiff herein, is, and at all times mentioned in the petition herein was, a domestic corporation organized and existing under the laws of the State of Maine, engaged in the business of mining and having an office at 25 Broad Street, borough of Manhattan, in the city and State of New York.

II

Plaintiff was incorporated on May 14, 1907, for the purpose of conducting general mining, milling and smelting operations. During 1919 and prior years, plaintiff owned, and still owns, together with other properties, mining lands near Ray, Ariz., consisting of 126 patented mining claims containing 2,143 acres, which mining lands and claims were acquired prior to March 1, 1913. These ore bodies occur in what is known as a blanket formation; that is to say, the ore is found in a horizontal zone, somewhat irregular on its upper and lower boundaries, but is distinguished from veins or lodes in that it does not extend at an angle and to great depths into the earth. The particular character of this deposit renders it susceptible of accurate measurement as to its extent, and its metal contents capable of definite ascertainment. The property was explored very thoroughly by the plaintiff, beginning in 1907, by what are known as "churn drills." In exploring its ore deposit, plaintiff caused to be drilled at corners of 200-foot squares a total of 353 drill holes covering an area of something in excess of 183 acres, the total amount of drilling aggregating 147,449 feet, or approximately 27 miles; the

average depth of these holes was 417 feet. The drilling was continued until the exterior limits of the ore deposits were reached [fol. 25] laterally and the holes showed no ore of commercial value. Of the holes thus drilled 277 showed ore of commercial value—the average depth of these holes being 440 feet and the average thickness of the ore 101 feet. The diameter of the holes drilled averaged about eight inches. The rock thus removed from the holes in the course of drilling was carefully sampled and assayed so that the grade of ore was definitely determined and the tonnage and metallic content was susceptible of mathematical determination.

After the extent and grade of the ore bodies were determined, the property was developed by shafts and drifts on a very elaborate scale and the actual mining of the ore has demonstrated the accuracy of the sampling of the drill holes as originally made. The outstanding characteristic of these porphyry copper mines is precisely that their ore bodies are well ascertained; and that this is the outstanding characteristic is well known to the mining world. The property was fully equipped by the construction of a concentrating plant with a capacity of 12,500 tons per day. The exploration of this property had proceeded before March 1, 1913, to such an extent that the minimum tonnage, or cubical contents, of ore, and the copper content per unit of ore, were at that time known to the management of the company. The property was not fully explored on March 1, 1913, and there was a strong probability of further ore contents, which probability has since been turned into a certainty, and there is even yet a probable ore tonnage not now taken into account. The minimum quantities were determined with an accuracy and certitude that do not require verification, but subsequent mining operations have fully verified it. During 1919, 1920, and prior years, this mining property was actively operated by plaintiff and a large amount of copper was mined, smelted, and sold. On December 31, 1919, large reserves of unmined ore had been developed, as before stated, and were known to exist.

III

In the year 1918 the plaintiff submitted to the Commissioner of the Internal Revenue a statement as to the value of its mineral property on March 1, 1913 (upon which depletion deductions for income tax purposes were to be based) as follows:

"Ray Consolidated Copper Company—Memorandum as to Depletion Allowance for Income Tax Returns Pursuant to Treasury Decision No. 2446

"The mining property of this company is owned in fee and was acquired prior to March 1, 1913.

"The method by which the value of the property as of March 1, 1913, was determined is as follows:

1a.	The gross copper contents of the mine as of December 31, 1916, was estimated by the company's engineers at.....	3,798,422,834 lbs.
1b.	To the foregoing was added the gross copper contents of the ore mined from March 1, 1913, to December 31, 1916, or.....	<u>362,769,548</u> "
2.	Making the total gross copper contents, as of March 1, 1913.....	4,161,192,382 lbs.
[fol. 26]		
3.	The life of the mine from March 1, 1913, is estimated at 24.29 years. This is based on the period elapsed from March 1, 1913, to December 31, 1916, 3.83 years plus 20.46 years, being the time which will be required to deplete the above number of pounds of copper based on a daily production of 12,500 tons.....	24.29 yrs.
4a.	The net copper contents of the ore mined to December 31, 1916, was.....	236,980,583 lbs.
4b.	The net copper contents of the balance of the ore in the mine estimated upon an extraction of 78.048%.....	<u>2,964,599,926</u> "
5.	Making a total net copper contents as of March 1, 1913.....	3,201,580,509 lbs.
6.	The selling price of copper during the life of the mine was based on the average price of copper for the 10 years ending December 31, 1916, which was.....	16.6739 c. per lb.
7.	The cost of production over the remaining life of the mine is estimated at.....	7.7181 c. per lb.
8.	The estimated net value per lb. of copper, using the foregoing selling price and cost of production, is.....	8.9558 c. per lb.
9a.	The value in the mine as of March 1, 1913, of 236,980,583(4) lbs. of copper mined during the 3 years and 10 months ending December 31, 1916, allowing for interest at the rate of 6% per annum and a replacement of capital by investment at 4%....	\$15,286,326.00
9b.	The value in the mine as of March 1, 1913, of 2,964,599,926(5) lbs. of copper to be mined during the remaining life of the property, allowing for interest at the rate of 6% per annum and a replacement of capital by investment at 4%, less 6% compounded for the 3 years and 10 months, March 1, 1913, to December 31, 1916, is.....	<u>112,417,291.00</u>
	Making the total value as of March 1, 1923	127,417,291.00

10. The total value "en bloc" (9) divided by the total estimated number of per-pound units (2) gives a per-pound unit value to be used in each year to determine the amount of depletion to be deducted under the ruling of the Treasury decision of...

*3.026 c.

"For the year 1916—mined during the year, 109,767,451 lbs.
 $\times 3.062 \text{ c.} = \$3,361,079.44.$ "

In this statement plaintiff contended that the determination of the value of the whole, or a portion of the physical and tangible assets of a corporation, by the ascertainment of the market value of its shares, with adjustments, has no support in law, and contended that the value of its mining property as of March 1, 1913, should be determined at \$127,417,291 in accordance with the above statement. The Commissioner of Internal Revenue changed certain factors in this computation and determined that the fair market value of the plaintiff's property on March 1, 1913, for the purpose of determining the depletion allowance deductible for income tax was \$93,678,245.28.

IV

On July 30, 1920, the plaintiff duly filed with the said collector of internal revenue its return on official form 707, with a rider attached thereto, for the year ended June 30, 1921, for the special tax imposed by section 1000 of Title X of the revenue act of 1918. Upon said return, plaintiff reported as the fair value of its capital stock for the preceding year ending June 30, 1920, determined by Exhibit [fol. 27] B in such said return, the sum of \$34,803,608.99, and as the total tax due thereon the sum of \$34,798.00. (A true copy of said return and rider as filed by plaintiff is made a part of this finding by reference thereto.)

V

Plaintiff at all times mentioned in the petition herein kept, and now keeps, its accounts and records on the basis of the calendar year. The stock of plaintiff at all times mentioned in the petition herein, was, and now is, all common stock. On December 31, 1919, there were outstanding 1,577,179 shares of plaintiff's common stock, each share having a par value of \$10. The same number of shares was outstanding during all of 1919 and 1920.

VI

Said outstanding shares of common stock of plaintiff were at all times mentioned in the petition herein listed on the New York Stock Exchange. During the calendar year 1919, 537,938 shares of said common stock were traded in bona fide transactions upon the New York Stock Exchange, such transactions occurring on prac-

*This figure is erroneous. The correct figure is 3.062 c.

tically every business day. The average of the twelve monthly mean prices realized on the above transactions in each of the twelve months of the year 1919 was \$22.067 per share.

VII

The value (\$34,803,608.99) reported by plaintiff on Form 707 as the fair value of its total capital stock (determined by Exhibit B) was determined by multiplying the number of shares outstanding during its last preceding fiscal year, the calendar year 1919, by the average sale value of common stock per share during 1919, determined as above stated, and was based directly upon the said sales and purchases of plaintiff's shares of stock in the transactions on the New York Stock Exchange during said year 1919, as set out herein above.

VIII

The information stated on said official form 707 as to the purchases and sales of shares of plaintiff's common stock, as aforesaid, was stated for the period and in the manner required by the instructions on said official Form 707 and the regulations of the Treasury Department, and the computation of the average sale value of common stock per share from such sales was made in the manner required by the instructions on said form and in said regulations. The parties hereto agree that for the purposes of this suit, the value of the corporate assets, in so far as such value may be determined to indicate the fair average value of the plaintiff's capital stock for the year ending June 30, 1920, may be determined as of December 31, 1919, and that the average sale value of the shares of the common stock of the plaintiff, in so far as such average selling price may be determined to indicate the fair average value of the plaintiff's capital stock for the year ending June 30, 1920, may be determined by tak-[fol. 28] ing the average of the twelve monthly mean prices realized on sales in the transactions of the New York Stock Exchange, referred to herein above, during the calendar year 1919.

IX

Upon the capital stock tax return filed by the plaintiff on July 30, 1920 (as set out in Finding IV hereof), a special tax was assessed against plaintiff under section 1000 of the revenue act of 1918 in the sum of \$34,789.00. The plaintiff duly paid said assessment, upon notice and demand, to the said collector of internal revenue.

X

After the receipt by the Treasury Department of the capital stock tax return with attached rider (filed by the plaintiff on July 30, 1920, as set out more fully in Finding IV hereof), and upon an examination of the return and rider by the Commissioner of Internal Revenue, it appeared that the valuation of property reported

by the plaintiff on the first line of Exhibit A of its capital stock tax return differed from and was lower than that shown by the statement of plaintiff referred to in Finding III hereof. Said rider stated that the book figures as stated on Exhibit A did not include the valuation used as the basis of depletion in computing Federal Income taxes. Thereupon on December 30, 1920, the Bureau of Internal Revenue addressed a communication to the plaintiff in words and figures as follows:

CST-2 N. Y.—CAD.

December 30, 1920.

Ray Consolidated Copper Company, 25 Broad Street, New York,
N. Y.

GENTLEMEN: Your capital stock tax return for the 1921 taxable period, reporting a fair value of \$34,803,608.99, as shown by Exhibit B of the return, has been received.

A statement accompanying the return is to the effect that the book figures, as stated under Exhibit A, do not include the valuation used as the basis of depletion in computing Federal income taxes.

Special instructions, paragraph 6, on page 4 of Form 707, state:

"* * * In the case of mines, oil and gas wells, other natural deposits, and timber, valuations reported as the basis of depletion in computing Federal income and profits taxes should be shown in the 'Fair value' column."

As the valuation claimed for depletion purposes is evidently in excess of the figure shown on the books and would in all probability greatly increase the valuation as shown by Exhibit A, it is requested you state the fair value of the item in question as well as your reasons for not considering the valuation reflected through the fair value columns as indicative of the fair value of your capital stock.

Respectfully, James Hagerman, Jr., Deputy Commissioner.
E. M. F.

[fol. 29] In reply to the above-mentioned letter, the plaintiff on January 12, 1921, addressed a letter to the Deputy Commissioner of Internal Revenue, in words and figures as follows:

CST—2 N. Y.—C. A. D.

Ray Consolidated Copper Company

January 12, 1921.

Hon. James Hagerman, Jr., Deputy Commissioner of Internal Revenue, Washington, D. C.

SIR: By your letter of December 30 (with identifying reference as above) you refer to our capital stock return for the 1921 taxable period, call attention to the statement accompanying the return to

the effect that the book figures as stated under Exhibit A do not include the valuation used as a basis of depletion in computing Federal income taxes, refer us to the instructions contained in paragraph 6 on page 4 of Form 707, and request that we now furnish a statement of the depletion valuation.

Complying with your request, we advise you that the valuation of the mineral property of this company as of March 1, 1913, as now determined in the Income Tax Unit of the Bureau of Internal Revenue is \$93,678,245, from which must be deducted all items to be treated as credits to depletion reserve since that date amounting, in total up to December 31, 1919, to \$13,318,384.31. This valuation was used by the company in filing its income and excess profits tax return for 1919.

We are advised that the depletion valuation, necessarily made as of March 1, 1913, has little if any bearing upon the "fair average value of the capital stock" of the company for the 1921 period. The proper valuation of our capital stock for that period rests upon the grounds which we have set forth in our return.

Your letter indicates that you may be inclined to regard the depletion valuation as interrelated with the capital stock valuation. We feel that our views upon this very important question can be more satisfactorily presented and those of the department more satisfactorily discussed in oral conference than by exchange of letters. After such conference we shall be glad to file a statement of our views, should that prove to be necessary.

Therefore, we respectfully ask such a conference with the proper officers of the bureau, at a convenient time and place to be named by you.

Respectfully, Arthur J. Ronaghan, Assistant Secretary.

The Commissioner of Internal Revenue thereupon caused to be made an audit of the capital stock tax return filed by plaintiff on July 30, 1920, as aforesaid, and determined the fair value of the property of the plaintiff as of December 31, 1919, to be the sum of \$93,678,245.28. This value was determined from the statement of plaintiff that its mining property for depletion purposes was \$127,417,291 on March 1, 1913 (as more particularly referred to in Finding III hereof), and upon other information. The fair value of such property as of December 31, 1919, so determined by the [fol. 30] Commissioner of Internal Revenue, was fixed at \$93,678.245.28. All other items shown by the plaintiff under "Debits and assets" of Exhibit A of its return were adopted by the Commissioner of Internal Revenue. Under the title "Credits and liabilities" of Exhibit A of the plaintiff's capital stock tax return, the Commissioner of Internal Revenue adopted all the items and figures included therein by the plaintiff, and in addition thereto allowed the claimant \$13,318,384.31 as its depletion allowance on account of ore removed since March 1, 1913. As a result of this audit the total of debits and assets was determined by the commissioner to be \$121,417,862.95, and the total of credits and liabilities were determined

by the commissioner to be \$17,507,453.88. The difference between these two amounts, to wit, \$103,910,409.07, was determined and fixed by the commissioner as the fair value of the total capital stock of the plaintiff, by which value the amount of capital stock tax due from the plaintiff was to be measured and computed. Such computation resulted in an additional capital stock tax due from the plaintiff in the sum of \$69,107.00. (A true and correct copy of the capital stock tax return filed by plaintiff on July 30, 1920, as stated in Finding IV hereof, showing the changes made therein by the commissioner, the fair value of the assets as determined by the commissioner, and the additional tax due, is marked "Exhibit No. 2" and made a part hereof by reference.)

XI

Under date of February 23, 1922, the Commissioner of Internal Revenue notified the plaintiff by letter that an additional assessment of capital-stock tax amounting to \$69,107.00 would be made against it for the year ending June 30, 1921. Said letter contained the following statement:

"You contend that the fair value of your capital stock is represented by the average prices of shares of stock established through market trading, whereas this office holds that in the case of your company, the fair value of the capital stock considered as a whole is not materially less than the net fair value of the assets. By using the values established for depletion purposes in connection with Federal taxes, the net worth reflected by the excess of assets over liabilities is \$103,910,000.00, which is considered indicative of the fair value of the capital stock for the purpose of this tax. You contended for a valuation of the mineral land as of March 1, 1913, less depletion sustained, equal to or in excess of the values shown in the above computation. Furthermore, it is not shown that there has been any material change from such values.

"On the basis determined, additional tax is computed as follows:

Fair value	\$103,910,000.00
Deduction	5,000.00
Fair value in excess of \$5,000.....	103,905,000.00
Tax at \$1 for each full \$1,000.....	103,905.00
Tax paid	34,798.00
Additional tax due.....	69,107.00

In determining the net fair value of the assets on December 31, 1919, the Commissioner of Internal Revenue took as the value of [fol. 31] the plaintiff's property on that day the sum of \$93,678.-245.28. This amount had therefore been determined by the Commissioner of Internal Revenue to be the fair market value of such prop-

erty on March 1, 1913, for the purpose of computing the depletion deduction to which the plaintiff was entitled in computing taxable income under the revenue act of 1916. Because of such valuation of plaintiff's property, the said Commissioner of Internal Revenue determined the item of "Property" to be \$93,678,245.28 instead of \$8,657,620.28 as reported by the company in its return filed as above stated hereinbefore. The commissioner allowed as an additional deduction on Exhibit A of Form 707 filed by plaintiff as aforesaid, the amount of \$13,318,384.31 as depletion sustained through removal of ore between March 1, 1913, and December 31, 1919. As to all other assets and liabilities, the commissioner accepted the amounts reported by the company in Exhibit A on said official Form 707. In this manner the commissioner determined that the net fair value of the assets of the plaintiff on December 31, 1919, was \$103,910,409.07 and estimated and determined that the fair value of the capital stock of the plaintiff on that date was \$103,910,409.07. In accordance with said determination, the commissioner assessed an additional capital-stock tax in the amount of \$69,107 against the plaintiff, and forwarded the same for collection to the collector of internal revenue.

XII

Thereafter, on March 28, 1922, the said collector of internal revenue made demand upon plaintiff for the payment of said additional capital-stock tax of \$69,107. Such additional amount was based wholly upon the increase in the amount of the "fair value" of the capital stock of the plaintiff resulting from the use of the aforesaid value for the mineral property. On April 6, 1922, plaintiff duly filed with the said collector of internal revenue a claim for abatement of said additional assessment of capital-stock tax amounting to \$69,107. Said claim for abatement was rejected by the said Commissioner of Internal Revenue under date of May 27, 1922.

XIII

Thereafter, on June 2, 1922, the said collector of internal revenue made a second demand for the payment of said additional assessment of capital-stock tax for the year ending June 30, 1921, amounting to \$69,107, and also made demand for interest on said sum at the rate of one per cent per month for one month, amounting to \$691.07. On June 5, 1922, the plaintiff, under threat by the said collector of seizure and sale of its property if it failed to make said payments, and in the belief that said threat would be carried out, paid to the said collector the said sum of \$69,107 for additional capital-stock tax and the said sum of \$691.07 as interest thereon. The total amount so paid was \$69,798.07. Said payments were made under duress and protest, and at the time of making such payments the plaintiff filed with the said collector of internal revenue a written protest against such additional assessment and against the payment [fol. 32] thereof and of interest thereon. Exhibit A attached to the

petition herein is a true and correct copy of such protest and the contents thereof are made a part hereof by reference.

XIV

The total sum of \$69,798.07 so paid by the plaintiff under protest to the said collector was thereafter by him turned over and deposited into the Treasury of the United States of America as in the usual course of his official business.

XV

On June 14, 1922, the plaintiff duly filed with the said collector a claim for refund of said payment of \$69,798.07. (Exhibit B is a true and correct copy of said claim for refund and the contents thereof are made a part of this finding by reference thereto.) Under date of June 29, 1922, such claim for refund was rejected in full by the said Commissioner of Internal Revenue.

XVI

Plaintiff maintains that it is entitled to a refund of \$69,798.00 paid by it on June 5, 1922, under duress and written protest to the collector of internal revenue for the second New York district at New York City, New York, as an additional capital-stock tax of \$69,107.00 assessed by the Commissioner of Internal Revenue of the United States for the period ending June 30, 1921, together with \$691.07 interest thereon. The provision of law upon which the plaintiff bases its claim for such refund is section 1000 of Title X of the act of February 24, 1919, entitled "An act to provide revenue and for other purposes" and known as the revenue act of 1918.

XVII

The parties hereto agree that certain regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, and certain forms issued by the Commissioner of Internal Revenue, may be referred to without the incorporation of such regulations or forms bodily by quotations in these findings of fact. The regulations and forms so referred to and incorporated herein by reference are the following:

"(a) Regulations No. 38 relating to the capital-stock tax under the revenue act of September 8, 1916, promulgated October 19, 1916.

"(b) Regulations No. 38 (revised) relating to the capital-stock tax under the revenue act of September 8, 1916, promulgated August 9, 1918.

"(c) Regulations No. 50 relating to the capital-stock tax under the revenue act of 1918, promulgated April 29, 1919.

"(d) Regulations No. 50 (revised) relating to the capital-stock tax under the revenue act of 1918, promulgated June 21, 1920.

"(e) Regulations No. 64 relating to the capital-stock tax under the revenue act of 1921, promulgated June 15, 1922.

"(f) Form 707, revised June, 1918."

[fol. 33]

XVIII

Plaintiff filed its capital-stock tax return on official Form 707, revised June, 1920, which said form contained certain instructions on page 4 thereof. The instructions so contained thereon are set out fully in the copy of said Form 707 as Exhibits No. (1) and No. (2), and the said instructions are made a part of this finding by reference thereto.

XIX

No other action than as aforesaid has been had on this claim in Congress or by any of the departments. The plaintiff has at all times borne true allegiance to the Government of the United States. It has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. It is and always has been the sole and absolute owner of the claim here presented. It has made no transfer or assignment of said claim or of any part thereof or of any interest therein.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and that its petition be and the same is hereby dismissed. Judgment is rendered against the plaintiff and in favor of the United States, for the cost of printing the record in this cause, the amount thereof to be fixed by the clerk and by him collected according to law.

OPINION

BOOTH, Judge, delivered the opinion of the court:

This is a suit to recover the sum of \$21,240.30 alleged to be due the plaintiff company because of an alleged revenue tax assessed and collected by the Commissioner of Internal Revenue under the provisions of section 1000, Title X, of the revenue act of 1918 (40 Stat. 1126), which reads as follows:

"Sec. 1000. (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—

"(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to \$1 for each \$1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of \$5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

"(2) Every foreign corporation shall pay annually a special ex-

cise tax with respect to carrying on or doing business in the United States, equivalent to \$1 for each \$1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year ending June thirtieth.

"(b) In computing the tax in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included.

[fol. 34] "(c) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231. The taxes imposed by this section shall apply to mutual insurance companies, and in the case of every such domestic company the tax shall be equivalent to \$1 for each \$1,000 of the excess over \$5,000 of the sum of its surplus or contingent reserves maintained for the general use of the business and any reserves the net additions to which are included in net income under the provisions of Title II, as of the close of the preceding accounting period used by such company for purposes of making its income tax return: Provided, That in the case of a foreign mutual insurance company the tax shall be equivalent to \$1 for each \$1,000 of the same proportion of the sum of such surplus and reserves, which the reserve fund upon business transacted within the United States is of the total reserve upon all business transacted, as of the close of the preceding accounting period used by such company for purposes of making its income tax return.

"(d) Section 257 shall apply to all returns filed with the Commissioner for purposes of the tax imposed by this section."

The Ray Consolidated Copper Company is a domestic corporation incorporated under the laws of the State of Maine. The company is engaged on a large scale in the general mining, milling, and smelting of copper ore. On July 30, 1920, the plaintiff company filed with the collector of internal revenue for the second district of New York, on forms prescribed and in pursuance of regulations adopted by the Commissioner of Internal Revenue, its return upon which capital-stock taxes in accord with the foregoing statute were to be assessed. Exhibit B discloses the average sale value of 537,938 shares of the plaintiff's 1,577,179 shares of common stock outstanding and traded in on the New York Stock Exchange during the calendar year 1919. The computation given and the results obtained were reached by taking the mean of the high and low sales for each month of the calendar year. By this process an average value of \$22.067 is accorded to each share, and multiplied by the whole number of shares issued and outstanding gives to the total number of shares a resultant value of \$34,803,608.99. Having then reached this claimed demonstrable conclusion the plaintiff company, in a separate note, attached to its return, contended that the method employed was and is within the terms of the capital stock tax act

and the intent of Congress when the tax was laid upon "the fair average value of its capital stock for the preceding year." A check for \$34,798 in payment of the tax according to its contention accompanied the return.

The Commissioner of Internal Revenue declined to accede to plaintiff's contention, and instead assessed and collected the tax on the basis of the net assets of the corporation. The commissioner gave full credit to all the evaluation estimates of the plaintiff with respect to its corporate property save one. The basic capital of the corporation is an extensive and valuable copper mine in Arizona. The plaintiff returned this property as worth \$8,657,620.28. The commissioner enhanced its worth to \$32,282,993.56. The commissioner's conclusion respecting this item of mining property was predicated [fol. 35] exclusively upon a return previously made by the plaintiff, where for the basis of ascertaining income taxes the corporation itself valued the mine at \$127,417,291. Subsequently, by the application of a depletion allowance formula put in force by the commissioner, and satisfactory to the plaintiff, the value of the mine was fixed at \$93,678,245.28. Allowing the plaintiff its conceded ratio of depletion and extending the same over a period of six years from March 1, 1913, to December 31, 1919, the commissioner finally fixed the mining property as worth on the latter date \$32,282,993.56 for the purposes of capital-stock assessment. The plaintiff in this litigation makes no protest against the proceedings of the commissioner referable to the accuracy of his computation, but the challenge is to the method employed. Therefore it is conceded that if the commissioner was within his legal rights in assessing and collecting the tax upon the fair average value of its net assets, fixed by him after allowing all just credits and debits at \$55,828,541.66, it may not recover the alleged overpayment of \$21,240.30 with interest thereon, for which this suit is brought, the plaintiff having paid the same under protest.

It is apparent from the stipulated findings and what has just been said that the single issue involved herein is the construction of the section of the statute authorizing the imposition of the tax. The plaintiff insists that the fair average value of its shares of stock "based upon bona fide transactions on a large scale in the open market establishes the value of its capital stock for the purpose of the tax," the defendant, on the other hand, insisting that the term "capital stock" as used in the act has no such restricted meaning; that clearly within the intendment of the statute Congress was imposing an excise tax on domestic corporations as going concerns, a tax on the privilege of conducting business as such, and directed the admeasurement of the same upon the value of such a privilege, ascertainable from the net value of its holdings, its possessions, the things tangible and intangible which concentrated into a single unit are fundamentally its capital stock, from which earnings and dividends are expected to flow. As aptly stated, "the tools," the instrumentalities available to the management in the prosecution of the corporate enterprise; that no precise, unyielding method, resting upon a fixed

standard of evaluation, such as the average market value of the corporation's shares of stock, is intended by the term "capital stock," but that, on the contrary, the generality of the tax, the differing and manifold complexities of corporate organization, the character of business involved, clearly import a legislative intention to tax "the entire potentiality of the corporation to profit by the exercise of its corporate franchise."

There are many cases in the books where this identical controversy has been involved. They illustrate with precisionness the seeming flexibility of the meaning of the term "capital stock." In both the courts and the financial world the term itself has not assumed a fixed and determinate significance capable of identifying its use as alone applicable to shares of stock of a corporation as opposed to accumulated assets of the same. As a matter of fact, it is frequently used in legislation to indicate one or the other. It may, we think, be said—at least the adjudications of the State courts are almost uniform upon this point—that in the imposition of property taxes laid upon the capital stock of corporations the term is held to mean the assets of [fol. 36] the corporation, its real possessions which the corporation uses and employs in its corporate activities. *Pacific Hotel Co. v. Lieb.*, 83 Ill. 602; *Chicago Union Traction Co. v. State Board of Equalization*, 112 Fed. 607; *Henderson Bridge Co. v. Commonwealth*, 99 Ky. 623; 166 U. S. 150; *Security Co. v. Hartford*, 61 Conn. 89-101; *State v. Duluth Gas & Water Co.*, 76 Minn. 96; *People v. Coleman*, 126 N. Y. 433; *Adams Express Co. v. Ohio*, 166 U. S. 185; *First National Bank v. Douglas Co.*, 124 Wis. 15.

In excise taxing statutes where there are no qualifying terms indicative of an express limitation of the term "capital stock" the ambiguity thus arising is resolvable only by recourse to the usual and elementary principles of statutory construction. What did Congress intend when it used the term as it did in this particular law?

The imposition of excise taxes, especially corporate excise taxes, is not a new form of revenue legislation. It has been frequently resorted to by both the State and Nation, and in the course of such legislation the value of the corporation's shares of stock, its assets, its net and gross income, etc., have been employed as the standard of measuring the tax. As a matter of fact, the factor of its ascertainment rests in the discretion of the legislature enacting the law. *Spreckles Sugar Co. v. McClain*, 192 U. S. 397; *Flint v. Stone Tracy Co.*, 220 U. S. 107.

By the act of June 13, 1898, 30 Stat. 448, Congress imposed a special excise tax upon the banking business of the country. A mere reading of the law seems sufficient to confirm the assertion that its policy was rigidly limited to the computation of the same upon the basis of capital, surplus, and undivided profits. In other words, the tax was to be measured by the net assets of the bank. The act of October 22, 1914, 38 Stat. 745, continued the banker's tax of 1898, with changed provisions as to the amount of the imposition, but still adhering to the legislative policy of measuring

the tax in accord with the net assets of the bank. Leather Manufacturers National Bank v. Treat, 128 Fed. 262.

In 1916 Congress adopted a more comprehensive policy in the matter of excise tax legislation, and instead of limiting the tax to bankers broadened the scope of the enactment and included all domestic corporations, joint-stock companies, and associations organized for profit and having a capital stock represented by shares. The tax was to be measured upon the basis of "the fair value of its capital stock, and in estimating the value of capital stock the surplus and undivided profits shall be included." The act of 1918, which followed the general policy of the act of 1916, substituted as the basis for computing the tax "the fair average value of its capital stock" instead of the "fair value" of the same.

An analysis of this legislation, considered in the light of its inception, as appears from the banker's taxing statute, clearly imports a legislative policy to measure the excise taxes provided for on the basis of the assets of the corporation. It was not until 1916, when the field was broadened and all domestic corporations came within the scope of the capital stock tax law, that doubt in this respect could possibly arise.

In the case of Central Union Trust Co. v. Edwards, 282 Fed. 1008, a case involving the construction of the act of 1916, the plaintiff [fol. 37] contended that "capital stock" in association with the other provisions of the law clearly meant paid-in capital, surplus, and undivided profits, less liabilities, or, in other words, net assets. It so happened in this particular case that the market value of the corporation's shares of stock was largely in excess of its book value, due to large and most attractive dividend distributions for some years. The collector of internal revenue, ignoring this contention, assessed and collected the tax upon the basis of the corporation as a going concern, including in his estimate all the factors, both tangible and intangible, which added to and were possessed by the corporation in the course of its going business. In other words, the collector computed the tax upon the "fair value of total capital stock," without limiting the computation to net assets. Manifestly this resulted in a largely increased tax. The district judge, in a written opinion, sustained the collector and was affirmed by the circuit court of appeals for the second circuit in 287 Fed. 324.

The reasoning of the court in both opinions cited above follows the channel marked out by the Supreme and State courts in construing corporate excise tax laws. Emphasis is put upon the character of the tax, an exaction demanded for a privilege, an imposition laid upon the legal entity known as a corporation and measured by its resources, "the entire potentiality of the corporation to profit by the exercise of its corporate franchise," and not upon property emanating therefrom but belonging to individuals.

When the Congress used the expression "the fair average value of its capital stock," as it did in the act of 1918, it manifested an intent to prescribe an equitable basis for the assessment of the tax, a design

to apply justly a tax exaction which, because of its general extent, in pursuance of the taxing policy adopted, was incapable of restraint within rigid rules for ascertainment. "Fair" means "just"; "average" indicates apportionment. It is not difficult to obtain an average value, and it would appear as a logical inference that the interpretation of the adjective "fair" was notice that in the adoption of "capital stock" as the basic factor for computing the tax it was not always possible to fix its average value, and therefore some discretion, some leeway, must be granted, some room allowed, so that the burden imposed would fall with measurable equality upon all corporations taxed. "Fair value" means market value ordinarily, the amount which sellers are willing to take and buyers to give, and if a fair, open market were always available, it may well be that the fair average value of a corporation's capital stock is the average of its market value. But the vast majority of domestic corporations do not list their shares of stock upon the New York or local stock exchanges. In fact, an insignificant number do. Many incorporated insurance companies have no shares of stock; others have both preferred and common; in hundreds of corporations the stock is closely held and rarely, if ever, sold. So that it seems to us that Congress was endeavoring in the use of the term "fair average value of the capital stock" to formulate a basis for the computation of the tax that would allow the commissioner in its assessment to take into consideration the resources of the corporation, its assets and liabilities, its entire possessions actually at work to produce earnings, the instrumentalities available to its management as a going concern, [fol. 38] and, from the sum total thus ascertained, strike a fair average value, a value fair to the corporation and to the Government. As said by Mr. Justice Brewer in *Powers v. Detroit, G. H. & M. Ry. Co.*, 201 U. S. 543, 561:

"Again, the tax is to 'be estimated upon the last annual report of the corporation.' While such report might be expected to include not merely the property belonging to the corporation but also the number and names of the stockholders and the number of shares held by each, and possibly also the amount paid in by each yet the word 'estimated' carries with it the idea of valuation rather than the mathematical apportionment. It suggests that the property reported by the corporation is to be the basis upon which the assessors shall make their valuation, so that the tax is 'estimated' upon that property rather than fixed by mere process of multiplication or division. * * * Under those circumstances we are of the opinion that the tax provided for by section 9 is a tax upon the property of the corporation and not a tax upon the shares of stock held by the shareholders."

If, as contended for, the market value of the shares of stock is the fundamental and only basis for measuring the tax when available, the word "fair" is decidedly meaningless. No difficulties present themselves in ascertaining the real, mathematical average market value of the same.

Again, the 1918 capital stock act contains an express provision:

"In estimating the value of capital stock the surplus and undivided profits *shall* be included." (Italics ours.) Congress during the whole course of excise-tax legislation has persistently and continuously inserted this provision in connection with the term "capital stock." Assuredly it may not be said that under any circumstances this clause is to be ignored. It is, indeed, the one plain and unambiguous provision which points out a definite, inflexible factor for entering into the estimate of capital stock. "*Shall* be included" is the language of the statute. Obviously, when given effect it precludes the idea of earnings of the corporations as furnishing the basis of computation for the tax. It precludes a consideration of profits, and discloses an intended purpose to use assets—at least assets represented by surplus and undivided profits—as one factor in arriving at the value of capital stock. But it is said that this provision serves a dual purpose. It furnishes a method for ascertaining the value of shares of stock when no market value of the same is available, and it prevents the commissioner from taking the par value of the shares in arriving at his estimate. There is no language in the statute which warrants us in dealing with alternatives. The difficulties in the administration of the law are not before the court for correction. It is no concern of ours whether the market value of shares of stock reflect the paid-in value of the authorized capital and the surplus and undivided profits, or not. The law says, and plainly says, that surplus and undivided profits shall be included in concluding an estimate of capital stock, and it may not be legally administered without their consideration. If the clause was resigned to preclude resort to par value, it signally fails in effectiveness, if market value of the shares [fol. 39] of stock, when available, is the single standard for innumerable shares of corporate stock are quoted for years on the stock market and freely offered at less than their par value.

When Congress expressly included surplus and undivided profits in the estimation of the capital stock of a corporation, it necessarily excluded resort to the market value of the shares of stock of the corporation, even when available, as the one and only basis of assessing an excise tax against the same, and intentionally predicated the assessment of the tax upon an asset basis. *Home Savings Bank v. Des Moines*, 205 U. S. 503.

Some things said and words used during a running but not prolonged interrogation of the chairman of the committee in charge of the bill in the House of Representatives, just prior to its passage, lend countenance to the plaintiff's insistence. Taken as a whole, however, it is more impressive as an exposition of opinion as to the detail of administration rather than a construction of the law. In any event, what was said is not sufficiently explicit to turn the issue in this case. No express meaning was definitely given to the term capital stock, differentiating it from shares of stock.

The commissioner's administration of the law and the regulations promulgated by him in nowise militate against its uniform appli-

cation. Corporate organization covers every form of business enterprise, and if we are correct in our view as to the meaning of capital stock, it is manifestly impossible to prescribe a set rule for its ascertainment in each particular instance. The plaintiff company's organization and business activity illustrate the manifold difficulties. Like many other corporations dependent for prosperity upon extracting elements from the earth, its capital stock is subject to depletion and fluctuation. Therefore it is apparent that what may reflect the average value of capital stock as applicable to one class of corporations may be wholly inapplicable to others of a different character and engaged in a wholly different business. The uniform measure of the tax is the fair average value of the capital stock, and if the regulations and the assessments made by the commissioner result in disclosing the fair average value, it may not be said to be without uniformity because the exact, unyielding basis is not employed in every instance. The plaintiff's contention, if conceded, would not remove the contingent aspect of regulations necessary to administer the law with uniformity or simplify its administration.

The facts in the case of the Central Union Trust Co. v. Edwards, *supra*, demonstrate the situation. The average market value of the trust company's shares of stock was \$788.75 each, the book value \$400 each. So that if two corporations, capitalized at the same amount, paying the same dividends, in one case where market value of its shares of stock is available, would be taxed on the basis of \$788.75 for each share, and the other, where market value is not available, on the basis of \$400 per share, and this situation was not unusual during the war. In other words, if plaintiff is correct, the tax is computed in some cases upon the average market value of the corporation's shares of stock, never less than par, and in others upon the assets of the corporation. Whatever else may be said, it is difficult to believe that Congress intended capital stock to mean shares [fol. 40] of stock predicated upon market value in one instance and upon asset value in another, differentiating the two by the interposition of sales only.

Capital stock and shares of stock owned by an individual have, and always have had, a distinct meaning. How simple it would have been for Congress to have used the term "shares of stock" or "shares of capital stock," instead of "capital stock," if it intended the former. If it was not contemplated by Congress to employ the assets of the corporation to measure the tax, why did it use apt words to so indicate? It had before it the act of 1916 containing a descriptive provision, viz. "having a capital stock represented by shares." It was familiar with the legislative policy of taxing capital employed and use in corporate business; it knew excise taxes had been measured by income; it knew it had the unrestricted right to select the measure and method of computing the tax; its knowledge of corporate organization was complete, and from what has been said, may we import into the law the word "shares," when the statute reads "capital stock," a term when used in connection with corporate taxation is more fre-

quently held to contemplate the actual holdings and possessions of the corporation, its own property, as opposed to shares of stock? More especially is this true when the term itself is considered in connection with the express mandate to include surplus and undivided profits in estimating the tax.

We had prepared and were just on the point of announcing the opinion in this case when the opinion of the Supreme Court in Hecht v. Malley, reached the court. The Hecht case, decided May 12, 1924, we think, disposes of this one. The opinion follows the decision of the Circuit Court of Appeals in Central Union Trust Co. v. Edwards, *supra*.

The petition will be dismissed. It is so ordered.

Hay, Judge; Downey, Judge; and Campbell, Chief Justice, concur.

[fol. 41]

VI. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Nineteenth day of May, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order and adjudge that the plaintiff as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of forty-eight dollars and forty-nine cents (\$48.49), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed June 2, 1924

From the judgment rendered in the above-entitled cause on the 19th day of May, 1924, in favor of the United States, claimant, by its attorneys, Root, Clark, Buckner & Howland, on the 2nd day of June, 1924, makes application for, and gives notice of an appeal to the Supreme Court of the United States.

Root, Clark, Buckner & Howland, Attorneys for Claimant.

VIII. ORDER ALLOWING APPEAL

On this 9th day of June, 1924, it is ordered by the Court that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 42] IN COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings of the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Booth, J.; of the judgment of the court; of the plaintiff's application for appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Tenth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

[fol. 43] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1924

No. 443

RAY CONSOLIDATED COPPER COMPANY, a Corporation, Appellant,
against

THE UNITED STATES, Respondent

STIPULATION CORRECTING CLERICAL ERROR IN RECORD—Filed Aug. 4, 1924

A clerical error having been made in preparing the record in the above case in the Court of Claims in that said Court inadvertently adopted as its findings of fact the original agreed statement of facts instead of the amended agreed statement of facts, and it clearly appearing from the record below that both parties requested the Court to adopt the amended agreed statement of facts as its findings of fact and that the Court decided the case on the basis of the amended agreed statement of facts and intended to adopt such amended agreed statement of facts as its findings of fact,

It is hereby stipulated and agreed by and between Arthur A. Ballantine, attorney for the Appellant, and Robert H. Lovett, Assistant Attorney General, and James M. Beck, Solicitor General, attorneys for The United States, that the transcript of record in the above entitled appeal be hereby amended to correct said clerical error by eliminating therefrom the findings of fact No. I to No. XIX, appearing on pages 24 to 33 of said transcript, and substituting in lieu thereof the findings of fact attached hereto and marked Exhibit

[fol. 44] A which follow verbatim the amended agreed statement of facts of record in the court below.

Dated July 28, 1924.

Arthur A. Ballantine, Attorney for Appellant. Robert H. Lovett, F. K. D., Assistant Attorney General; James M. Beck, F., Solicitor General, Attorneys for the United States.

[fol. 45]

EXHIBIT A TO STIPULATION

(1) Ray Consolidated Copper Company, the claimant herein, is, and at all times mentioned in the amended petition herein was, a domestic corporation organized and existing under laws of the State of Maine, engaged in the business of mining and having an office at 25 Broad Street, borough of Manhattan, in the city and State of New York.

(2) Claimant was incorporated on May 14, 1907, for the purpose of conducting general mining, milling and smelting operations. During 1919 and prior years claimant owned, and still owns, together with other properties, mining lands near Ray, Arizona. In such lands the ore bodies occur in what is known as a blanket formation, that is to say, the ore is found in a horizontal zone, somewhat irregular on its upper and lower boundaries, but is distinguished from veins or lodes in that it does not extend at an angle and to great depths into the earth. The particular character of this deposit renders it susceptible of accurate measurement as to its extent, and its mental contents capable of definite ascertainment. The property was explored very thoroughly by the claimant, beginning in 1907, by what are known as "churn drills," and the tonnage and metallic content of the ore deposit were accurately determined. The property was developed by shafts and drifts on an elaborate scale and the actual later mining of the ore on a very large scale has demonstrated the accuracy of the sampling made by means of the drill holes. The property was fully equipped for such mining by the construction of a concentrating plant with a capacity of 12,500 tons per day. During 1919, 1920, and prior years, this mining property was actively operated by claimant and a large amount of copper [fol. 46] was mined, smelted, and sold. On December 31, 1919, large reserves of unmined ore remained.

(3) In the year 1918 the claimant submitted to the Commissioner of the Internal Revenue a memorandum as to the value of its mineral property on March 1, 1913 (upon which depletion deductions for income tax purposes were to be based), reading in part as follows:

Ray Consolidated Copper Company—Memorandum as to Depletion Allowance for Income Tax Return Pursuant to Treasury Decision No. 2446

"The mining property of this company is owned in fee and was acquired prior to March 1, 1913.

"The method by which the value of the property as of March 1, 1913, was determined is as follows:

1a. The gross copper contents of the mine as of December 31, 1916, was estimated by the company's engineers at.....	3,798,422,834 lbs.
1b. To the foregoing was added the gross copper contents of the ore mined from March 1, 1913, to December 31, 1916, or.....	362,769,548 lbs.
2. Making the total gross copper contents, as of March 1, 1913.....	4,161,192,382 lbs.
3. The life of the mine from March 1, 1913, is estimated at 24.29 years. This is based on the period elapsed from March 1, 1913, to December 31, 1916, 3.83 years plus 20.46 years, being the time which will be required to deplete the above number of pounds of copper based on a daily production of 12,500 tons.....	24.29 years
4a. The net copper contents of the ore mined to December 31, 1916, was.....	236,980,583 lbs.
4b. The net copper contents of the balance of the ore in the mine estimated upon an extraction of 78.04% is.....	2,964,599,926 lbs.
5. Making a total net copper contents as of March 1, 1913.....	3,201,580,509 lbs.
6. The selling price of copper during the life of the mine was based on the average price of copper for the 10 years ending December 31, 1916, which was.....	16.6739 c. per lb.
7. The cost of production over the remaining life of the mine is estimated at.....	7.7181 c. per lb.
8. The estimated net value per lb. of copper, using the foregoing selling price and cost of production is.....	8.9558 c. per lb.
9a. The value in the mine as of March 1, 1913, of 236,980,583 (4) lbs. of copper mined during the 3 years and 10 months ending December 31, 1916, allowing for interest at the rate of 6% per annum and a replacement of capital by investment at 4% .	\$15,286,326.00

9b. The value in the mine as of March 1, 1913, of 2,964,599,926 (5) lbs. of copper to be mined during the remaining life of the property, allowing for interest at the rate of 6% per annum and a replacement of capital by investment at 4%, less 6% compounded for the 3 years and 10 months, March 1, 1913 to December 31, 1916, is.....	112,130,965.00
Making the total value as March 1, 1913..	127,417,291.00
10. The total value "en bloc" (9) divided by the total estimated number of per-pound units (2) gives a per-pound unit value to be used in each year to determine the amount of depletion to be deducted under the rulings of the Treasury Decision of.....	13.026c.

[fol. 47] "For the year 1916, mined during the year, 109,767,451
lbs. x 3.062c. = \$3,361,079.44."

In this memorandum claimant contended that the determination of the value of the whole, or a portion of the physical and tangible assets of a corporation, by the ascertainment of the market value of its shares, with the adjustments, has no support in law, and contended that the value of its mining property as of March 1, 1913, should be determined at \$127,417.291 in accordance with the above statement. The Commissioner of Internal Revenue at that time made a computation by the same general method as that employed by the claimant in the above computation and determined that the fair market value of the claimant's mining property on March 1, 1913, for the purpose of determining the depletion allowance deductible for income tax was \$93,678,245.28.

(4) On July 30, 1920, the claimant duly filed with the collector of internal revenue for the second district, New York, N. Y., its return on official Form 707, with a rider attached thereto, for the year ended June 30, 1921, for the special tax imposed by section 1000 of Title X of the revenue act of 1918. Upon said return, claimant reported as the fair value of its capital stock for the preceding year ending June 30, 1920, determined by Exhibit B in said return, the sum of \$34,803,608.99, and as the total tax due thereon the sum of \$34,798.00. A true copy of said return and rider as filed by claimant is attached hereto and made a part of this stipulation and marked "Exhibit No. 1." Said Exhibit No. 1 consists of a four-page facsimile of official Form 707, upon which appears a true copy of the words and figures entered thereon and the rider attached thereto by the claimant prior to the filing of said return.

(5) Claimant at all times mentioned in the petition herein kept, and now keeps, its accounts and records on the basis of the calendar

¹ This figure is erroneous. The correct figure is 3.062 c.

year. The stock of claimant at all times, mentioned in the petition herein, was, and now is, all common stock. On December 31, 1919, there were outstanding 1,577,179 shares of claimant's common stock, each share having a par value of \$10.00. The same number of shares was outstanding during all of 1919 and 1920.

(6) Said outstanding shares of common stock of claimant were at all times mentioned in the petition herein listed on the New York Stock Exchange. During the calendar year 1919, 537,938 shares of said common stock were traded in bona fide transactions upon the New York Stock Exchange, such transactions occurring on practically every business day. The average of the twelve monthly mean prices realized on the above transactions in each of the twelve months of the year 1919 was \$22.067 per share.

(7) The value (\$34,803,608.99) reported by claimant on Form 707 as the fair value of its total capital stock (determined by Exhibit B) was determined by multiplying the number of shares outstanding during its last preceding fiscal year, the calendar year 1919, by the average sale value of common stock per share during 1919, determined as above stated, and was based directly upon the said sales and purchases of claimant's shares of stock in the transactions on the New York Stock Exchange during said year 1919, as set out herein above.

(8) The parties hereto agree that for the purpose of this suit the average sale value of the shares of the common stock of the claimant [fol. 48] may be determined by taking the average of the twelve monthly mean prices realized on sales in the transactions of the New York Stock Exchange, referred to herein above, during the calendar year 1919.

(9) Upon the capital stock tax return filed by the claimant on July 30, 1920 (as set out in paragraph 4 of this agreed statement of facts), a special tax was assessed against claimant under section 1000 of the revenue act of 1918 in the sum of \$34,798.00. The claimant duly paid said assessment, upon notice and demand, to the said collector of internal revenue.

(10) After the receipt by the Treasury Department of said capital stock tax return with attached rider, and on December 30, 1920, the Bureau of Internal Revenue addressed a communication to the claimant in words and figures as follows:

CST—2 N. Y. CAD.

December 30, 1920.

Ray Consolidated Copper Company, 25 Broad Street, New York,
N. Y.

GENTLEMEN: Your capital stock tax return for the 1921 taxable period, reporting a fair value of \$34,803,608.99, as shown by Exhibit B of the return, has been received.

A statement accompanying the return is to the effect that the book figures, as stated under Exhibit A, do not include the valua-

tion used as the basis of depletion in computing Federal income taxes.

Special instructions, paragraph 6, on page 4 of Form 707, state:

"* * * In the case of mines, oil and gas wells, other natural deposits, and timber, valuations reported as the basis of depletion in computing Federal income and profits taxes should be shown in the 'fair value' column."

As the valuation claimed for depletion purposes is evidently in excess of the figures shown on the books and would in all probability greatly increase the valuation as shown by Exhibit A, it is requested you state the fair value of the item in question as well as your reasons for not considering the valuation reflected through the fair value columns as indicative of the fair value of your capital stock.

Respectfully, James Hagerman, Jr., Deputy Commissioner.
E.MF.

In reply to the above-mentioned letter, the claimant on January 12, 1921, addressed a letter to the Deputy Commissioner of Internal Revenue, in words and figures as follows:

CST—2 N. Y.—C. A. D.

Ray Consolidated Copper Company

January 12, 1921.

Hon. James Hage-man, Jr., Deputy Commissioner of Internal Revenue, Washington, D. C.

SIR: By your letter of December 30 (with identifying reference as above) you refer to our capital stock return for the 1921 taxable period, call attention to the statement accompanying the return to the effect that the book figures as stated under Exhibit A do not include the valuation used as a basis of depletion in computing Fed-[fol. 49] eral income taxes, refer us to the instructions contained in paragraph 6 on page 4 of Form 707, and request that we now furnish a statement of the depletion valuation.

Complying with your request, we advise you that the valuation of the mineral property of this company as of March 1, 1913, as now determined in the Income Tax Unit of the Bureau of Internal Revenue is \$93,678,245, from which must be deducted all items to be treated as credits to depletion reserve since that date amounting, in total, up to December 31, 1919, to \$13,318,384.31. This valuation was used by the company in filing its income and excess profits tax return for 1919.

We are advised that the depletion valuation, necessarily made as of March 1, 1913, has little if any bearing upon the "fair average value of the capital stock" of the company for the 1921 period. The proper valuation of our capital stock for that period rests upon the grounds which we have set forth in our return.

Your letter indicates that you may be inclined to regard the depletion valuation as interrelated with the capital stock valuation.

We feel that our views upon this very important question can be more satisfactorily presented and those of the department more satisfactorily discussed in oral conference than by exchange of letters. After such conference we shall be glad to file a statement of our views, should that prove to be necessary.

Therefore, we respectfully ask such a conference with the proper officers of the bureau, at a convenient time and place to be named by you.

Respectfully, Arthur J. Ronaghan, Assistant Secretary.

The Commissioner of Internal Revenue thereupon caused to be made an audit of the capital stock tax return filed by the claimant on July 30, 1920, as aforesaid, and determined the fair value of the capital stock of the claimant as of December 31, 1919, to be the sum of \$103,910,409.07. In said audit the commissioner changed the item "Property" on page (2) of the return (Exhibit No. 2 hereof) from \$8,657,620.28 to \$93,678,245.28, and accepted the figures of the plaintiff as to the other items of "debits and assets." The commissioner also allowed all the "credits and liabilities" on page (2) of the return (Exhibit No. 2 hereof) except that he made an additional allowance under the heading "Depletion" of \$13,318,384.31. The figure of \$93,678,245.28 represents the March 1, 1913, value of the ore in place as determined by the commissioner. The figure \$13,318,384.31 represents the depletion, as determined by the commissioner, sustained by mining operations from March 1, 1913, to December 31, 1919. As a result of this audit the total of debits and assets was determined by the Commissioner of Internal Revenue to be \$121,417,862.95, and the total of credits and liabilities was determined by the commissioner to be \$17,507,453.88, and the net fair value of the assets of the claimant on December 31, 1919, was thus determined by the commissioner to be the difference between these two amounts, to wit: \$103,910,409.07, and this amount was determined and fixed by the Commissioner of Internal Revenue as the fair value of the total capital stock of the claimant, by which value [fol. 50] the amount of capital stock tax due from the claimant was to be measured and computed. Such computation resulted in an additional capital stock tax due from the claimant in the sum of \$69,107.00. Attached hereto and marked "Exhibit No. 2," and made a part thereof, is a facsimile of the capital stock tax return, consisting of four pages and a rider, as filed by the claimant on July 30, 1920, with the words, figures, and notations written or stamped thereon by the Commissioner of Internal Revenue or officials acting under his directions. All words, figures, and notations appearing on said Exhibit No. 2 which do not appear on Exhibit No. 1 were made thereon by the Commissioner of Internal Revenue or officials acting under his directions after said return had been filed.

(11) Under date of February 23, 1922, the Commissioner of Internal Revenue notified the claimant by letter that an additional assessment of capital stock tax amounting to \$69,107.00 would be made against it for the year ending June 30, 1921. Said letter contained the following statement:

"You contend that the fair value of your capital stock is represented by the average prices of shares of stock established through market trading, whereas this office holds that in the case of your company, the fair value of the capital stock considered as a whole is not materially less than the net fair value of the assets. By using the values established for depletion purposes in connection with Federal taxes, the net worth reflected by the excess of assets over liabilities is \$103,910,000.00, which is considered indicative of the fair value of the capital stock for the purpose of this tax. You contended for a valuation of the mineral land as of March 1, 1913, less depletion sustained, equal to or in excess of the values shown in the above computation. Furthermore, it is not shown that there has been any material change from such values.

"On the basis determined, additional tax is computed as follows:

Fair value.....	\$103, 910, 000. 00
Deduction.....	5, 000. 00
Fair value in excess of \$5, 000.....	103, 905, 000. 00
Tax at \$1 for each full \$1,000.....	103, 905. 00
Tax paid.....	34, 798. 00
Additional tax due.....	69, 107. 00"

(12) Thereafter, on March 28, 1922, the said collector of internal revenue made demand upon claimant for the payment of said additional capital stock tax of \$69,107. On April 6, 1922, claimant duly filed with the said collector of internal revenue a claim for abatement of said additional assessment of capital stock tax amounting to \$69,107. Said claim for abatement was rejected by the said Commissioner of Internal Revenue under date of May 27, 1922.

(13) Thereafter, on June 2, 1922, the said collector of internal revenue made a second demand for the payment of said additional assessment of capital stock tax for the year ending June 30, 1921, amounting to \$69,107, and also made demand for interest on said sum at the rate of one per cent per month for one month, amounting to \$691.07. On June 5, 1922, the claimant, under threat by the said collector of seizure and sale of its property if it failed to make said [fol. 51] payments, and in the belief that said threat would be carried out, paid to the said collector the said sum of \$69,107 for additional capital stock tax and the said sum of \$691.07 as interest thereon. The total amount so paid was \$69,798.07. Said payments were made under duress and protest, and at the time of making such payments the claimant filed with the said collector of internal revenue a written protest against such additional assessment and against the payment thereof and of interest thereon. Exhibit A attached to the amended petition herein is a true and correct copy of such protest and the contents thereof are made a part of this stipulation.

(14) The total sum of \$69,798.07 so paid by the claimant under protest to the said collector was thereafter by him turned over and

deposited into the Treasury of the United States of America as in the usual course of his official business.

(15) On June 14, 1922, the claimant duly filed with the said collector a claim for refund of said payment of \$69,798.07. Exhibit B attached to the amended petition herein is a true and correct copy of said claim for refund and the contents thereof are made a part of this stipulation. Under date of June 29, 1922, such claim for refund was rejected in full by the said Commissioner of Internal Revenue.

(16) Thereafter this action was started by the filing of the original petition herein on August 2, 1922. An agreed statement of facts was filed on March 28, 1923, and claimant's request for findings of fact and brief was filed on May 19, 1923. Thereafter, on November 9, 1923, the claimant received a refund from the United States of \$48,557.77, this being a refund of a portion of the amount of \$69,798.07 claimed in the original petition herein, together with interest on said refund from June 6, 1922, the date of payment. Said refund was accompanied by a "Notice of adjustment of claim for refund," reading in words and figures as follows:

Washington, D. C.

Notice of Adjustment of Claim for Refund

[Claim No. R19048 AWW. District 2, N. Y. Schedule No. CST
—R—9—72.]

Ray Consolidated Copper Co., 25 Broad Street, New York, New York.

Interest due from—

- (a) Date of payment and filing of specific protest which is on file in the bureau.
- (b) Date of payment of additional assessment which was made in this case.
- (c) Six months after date of filing claim to date of allowance.

GENTLEMEN: Your claim for refund of additional capital stock tax and one per cent interest thereon for the taxable period ended June 30, 1921, erroneously or illegally collected, has been adjusted as shown below.

Claimed.....	\$69,798.07
Allowed.....	48,557.77
Rejected.....	21,240.30

Date of payment June 6, 1922.

[fol. 52] The adjustment shown above is the result of a reconsideration of the claim, in accordance with the attached statement.

Included in the check is \$1,245.87, interest allowed on \$48,557.77 from June 6, 1922 (b) to November 10, 1923.

A check by the disbursing clerk of the department for the amount refunded is forwarded herewith.

Respectfully, (Signed) R. M. Estes, Deputy Commissioner.
AFH.

CST-2 N. Y.-46-AWW CI-R19048

Ray Consolidated Copper Company

Re Claim for the Refunding of \$69,798.07, Additional Capital Stock Tax and One Per Cent Interest, for the Taxable Period Ended June 30, 1921.

The rejection under date of June 29, 1922, of the claim for the refunding of \$69,798.07 has been reconsidered.

The corporation reported a fair value of \$34,803,608.99, based on its sales on the stock exchange. The natural resources division of the Income Tax Unit valued the mining property of the corporation at \$93,678,245.28 and the additional assessment of \$69,107 was made by basing the fair value on Exhibit A instead of Exhibit B, and substituting this value for the value as shown by the books of account.

Upon a further examination by the Income Tax Unit, after taking into consideration all elements entering into the value of the copper mining operations, it estimated the value of the physical property to be \$32,282,993.56 as of December 31, 1919. By substituting this valuation for the valuation previously used in determining the additional tax, a refund due the corporation is indicated as follows:

Total value of assets.....	\$60,022,611.23
Total liabilities.....	4,189,069.57
Fair value of capital stock.....	55,833,541.66
Deduction allowed by law.....	5,000.00
Fair value in excess of \$5,000.....	55,828,541.66
Tax at \$1 for each full \$1,000.....	55,828.00
Tax paid.....	103,905.00
Tax overpaid.....	48,077.00
Interest on above.....	480.77
Total amount overpaid.....	48,557.77

On November 14, 1923, the claimant received a letter from the Bureau of Internal Revenue showing in detail the manner in which the Commissioner of Internal Revenue had determined that the total value of claimant's assets on December 31, 1919, was \$60,022,611.23, and that the total liabilities on December 31, 1919, were \$4,189,069.57. A copy of said letter is attached hereto and marked "Exhibit 3" and made a part hereof.

By reason of said refund of \$48,557.77, the amount in controversy in this action has been reduced from \$69,798.07 to \$21,240.30. By leave of the court, an amended petition was filed herein on November 19, 1923.

[fol. 53] (17) Claimont maintains that it is entitled to a refund of \$21,240.30, the unrefunded portion of the amount paid by it on June 5, 1922, under duress and written protest to the collector of internal revenue for the second New York District at New York City, New York, as an additional capital-stock tax of \$69,107.00 assessed by the Commissioner of Internal Revenue of the United States for the period ending June 30, 1921, together with \$691.07 interest thereon. The provision of law upon which the claimant bases its claim for such refund is section 1000 of Title X of the act of February 24, 1919, entitled "An act to provide revenue and for other purposes" and known as the revenue act of 1918.

(18) While the bill which eventually became the revenue act of 1916 was under consideration in Congress, certain discussions took place on the floors of the Senate and of the House. While the bill which eventually became the revenue act of 1918 was under consideration in Congress, certain amendments were made to the section imposing the capital-stock tax, certain committee reports were made and certain discussions took place on the floors of the Senate and of the House. Such of these discussions, reports and amendments as are set out in the Congressional Record, in official reports of committees, or in official prints of the bills at various stages, and such as are pertinent to the matters at issue in this case, are hereby referred to and made a part of this agreed statement of facts, without incorporation of the same herein by quotation.

(19) The parties hereto agree that certain regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, and certain forms issued by the Commissioner of Internal Revenue, may be referred to, cited, quoted and argued, both orally and in briefs, by the parties hereto, without the incorporation of such regulations or forms bodily by quotations in this agreed statement of facts. The regulations and forms so referred to and incorporated herein by reference are the following:

"(a) Regulations No. 38 relating to the capital stock tax under the revenue act of September 8, 1916, promulgated October 19, 1916.

(b) Regulations No. 38 (revised) relating to the capital stock tax under the revenue act of September 8, 1916, promulgated August 9, 1918.

(c) Regulations No. 50 relating to the capital stock tax under the revenue act of 1918, promulgated April 29, 1919.

(d) Regulations No. 50 (revised) relating to the capital stock tax under the revenue act of 1918, promulgated June 21, 1920.

(e) Regulations No. 64 relating to the capital stock tax under the revenue act of 1921, promulgated June 15, 1922.

(f) Form 707, revised June, 1918."

(20) Claimant filed its capital stock tax return on official Form 707, revised June, 1920, which said form contained certain instructions on page 4 thereof. The instructions so contained thereon are set out fully in the copy of said Form 707 attached to this agreed statement of facts as Exhibits No. (1) and No. (2) and the said instructions are hereby referred to and made a part of this agreed statement of facts.

(21) No other action than as aforesaid has been had on this claim in Congress or by any of the departments. The petitioner [fol. 54] has at all times borne true allegiance to the Government of the United States. It has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. It is and always has been the sole and absolute owner of the claim here presented. It has made no transfer or assignment of said claim or of any part thereof or of any interest therein.

[fol. 55] [File endorsement omitted.]

[fol. 56] [File endorsement omitted.]

Endorsed on cover: File No. 30,408. Court of Claims. Term No. 443. Ray Consolidated Copper Company, appellant, vs. The United States. Filed June 12th, 1924. File No. 30,408.

(4607)



EXHIBIT A. (See Special Instructions No. 4, page 4.)

CONDENSED BALANCE SHEET AS OF December 31, 1919

(Same date as Item 7, page 1.)

BANKS AND INSURANCE COMPANIES MAY ATTACH PRINTED STATEMENTS.

DEBITS AND ASSETS.	BOOKS OF ACCOUNT.	FAIR VALUE.	DIFFERENCE. • (Explain any large amounts.)
Total estate Property.....	\$ 8,557	620	28
Mortgage Constr'n. & Equip't	8,722	509	49
Machinery.....	2,809	824	72
Securities.....	1,813	633	98
Cash.....			
Notes receivable.....			
Accounts receivable.....			
Inventory.....			
Other assets.....			
Prepaid Ins., etc.			
Good will, patents, etc.			
Deferred charges.....			
TOTALS.....	\$36,397	237	95
CREDITS AND LIABILITIES.	BOOKS OF ACCOUNT.	FAIR VALUE.	DIFFERENCE.
Bonded debt.....	\$ 8		\$
Less in Treas.....	—		
Mortgages.....	189	556	48
Accounts payable.....			
Notes payable.....			
Other liabilities Treatment chgs.	433	309	79
Reserves.....			
Depreciation.....	2,475	437	79
Depletion.....			
Taxes.....			
Deferred credits.....			
Capital stock:			
Preferred.....	\$ 8		
Less in Treas.....	1,090	765	51
Common.....	14	189	69
Less in Treas.....	15	771	790
Surplus From Securities.....	1	506	11
Profit and loss.....	14	929	732
TOTALS.....	\$36,397	237	95
RECAPITULATION OF EXHIBIT A.			
This column for use of taxpayer.			
DOMESTIC CORPORATIONS.			
Total of debts and assets after deducting items not actual assets.....	\$ 36	397	237
Less total of credits and liabilities after deducting capital stock, surplus, and other items not actual liabilities.....	4	189	69
Stock INSURANCE COMPANIES.			
Fair value of assets.....			
Less actual liabilities and reserves, including deposits.....			
Difference (value of total capital stock reflected by Exhibit A).....	\$ 32	208	168
This column for use of Departmental.			

- * Material differences will not be allowed unless satisfactorily explained.

The fair value of the Capital Stock determined by Exhibit "B" is used for the computation of the tax since such sales, made in substantial volume in a free and open market, represent the "fair average value of the Capital Stock for the preceding year." The law makes this the measure of the tax and this corporation respectfully urges that a calculation, such as is made in Exhibit "B", based upon bona fide transactions on a large scale in an open market, establishes the value of its Capital Stock for the purpose of this tax.

The book figures as stated on Exhibit "A" do not include the valuation used as the basis of depletion in computing Federal Income Taxes. This valuation as determined by the Department was as of March 1, 1913, and the conditions existing at that date were materially different from those which existed during the year just closed. Such valuation also was under a different statute reading "the fair market value of the property." For these reasons, as well as because of the better basis furnished by Exhibit "B", the valuation placed on the property for the purpose of depletion is not used as a basis for the Capital Stock Tax.

In stating the net income in Exhibit "C" the figures for the years 1915, 1916 and 1917 have been stated on the basis of the taxable income for those years as restated by the Department as a result of its audit of the Company's tax returns.

In the column headed "Deductions" the amounts stated are the amounts of taxes (Income and Excess Profits) as now assessed or re-assessed by the Department. In 1918 there were also donations to Red Cross and War Work Funds which are not deductible on the tax returns.

The additions consist of non-taxable income.

The resulting balance is stated as Adjusted Income although such adjusted income exceeds the income shown by the books for those years by the amount of disallowances made by the Department.

The average annual income as thus determined is shown as capitalized at 12% which we believe to be a fair return to be figured for property of this class under the conditions which existed during the past year. During the year Government tax-exempt bonds have been selling at a 6 $\frac{1}{2}$ to 6% basis, high grade industrial bonds have been selling on a 7 $\frac{1}{2}$ to 8% basis, and it is therefore believed that a fair return on the stock of this company under such conditions would be not less than 12%.

This gives substantially the same valuation as that shown in Exhibit "B". As Exhibit "B" reflects more accurately "the fair average value of the Capital Stock for the preceding year" as contemplated by the Capital Stock Tax Law, the return herewith is presented on the basis of the valuation there shown.

In addition to the "Dividends Declared" in 1917 of \$3.70 there was a "Capital Distribution" of 50¢ per share. In 1919 there were Capital Distributions of \$2.00 per share.

EXHIBIT B. (See Special Instructions No. 5, page 4.)

TRANSACTIONS OR OUTSIDE SALES PRICES New York Stock Exchange Month of high and low sales - 1920		Gross sales \$1,000,000	
		FIRST PREFERRED.	
		COMMON.	
MONTH.	Number of shares outstanding.	Price.	Price.
January	1577179	\$ 20.875	\$
February	" 20.000	19.625	.....
March	" 20.875	21.500	.....
April	" 23.6875	25.9375	.....
May	" 24.1875	25.4375	.....
June	" 25.000	21.000	.....
July	" 26.8125	20.6875	.....
August	" 22.0677	22.0677	.....
September	" 22.0677	22.0677	.....
October	" 22.0677	22.0677	.....
November	" 22.0677	22.0677	.....
December	" 22.0677	22.0677	.....
Total.	22.0677	22.0677	.....
Average.	22.0677	22.0677	.....

RECAPITULATION OF EXHIBIT B.

Average sale value of common stock per share, \$22.0677, multiplied by 1577179 number of shares outstanding.

Average sale value of first preferred stock per share, \$, multiplied by number of shares outstanding.

Average sale value of second preferred stock per share, \$, multiplied by number of shares outstanding.

Total (value of total capital stock reflected by Exhibit B)

Approximate number of shares traded in during the year: Common

Capital stock outstanding as of June 30, 1920: Common

EXHIBIT C. (See Special Instructions No. 6, page 4.)

ANNUAL INCOME.

FISCAL YEAR-Ended-	NET INCOME. (Deduct in red.)	DEDUCTIONS.	ADDITIONS.	ADJUSTED INCOME.	NUMBER OF SHARES.	DIVIDENDS DECLARED.	DEPRECIATION.
					Common.	First preferred.	Second preferred.
191 5	\$ 3 754 758 35	\$	\$	\$ 3 754 758 35	1,25	%	% 01
191 6	\$ 9 550 169 62	191 002 38	\$ 9 359 166 14	2,72	%	% 67	% 73
191 7	8 107 852 617 199 097 65	-	6 388 754 76	3,70	%	% 08	% 34
191 8	2 336 392 184 25 399 35	281 972 88	2 192 965 73	3,26	%	% 13	% 30
19 9	997 215 75	844 38222	519 133 87	-	%	%	% 52
Total	23 846 388 122 336 344 64	604 735 38	22 014 778 85	10 95		1 190	2 2943
Average	\$4 769 276 2	xxxxxx	\$4 402 955 77	2,19	%	% 28	% 87

RECAPITULATION OF EXHIBIT C.

STATE or CITY	NEW YORK						
Average annual income as adjusted Capitalized at _____ per cent (value of total capital stock reflected by Exhibit C)	\$ 4	402	955	77	\$

We, Charles S. Hayden, Vice President, and C. W. Jenkins, Asst. Treasurer, of the above-named company, whose return for special excise tax is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct.

Sworn to and subscribed before me this 30th day of July, 1920.

(Sgd) Charles Finkler
Notary Public
(Official capacity)

(3)



(Sgd) Charles Hayden
Vice President
(Sgd) C. V. Jenkins
Asst. Treasurer
(See instructions on page 4.)

SPECIAL INSTRUCTIONS

1. Required Value.—The capital stock tax except on domestic mutual insurance companies is measured by the fair value of the total capital stock for the year preceding the taxable year, whether or not it is organised or profit or loss companies, see page 1, form 707, Revised.

For the purpose of this tax the fair value of the entire capital stock as a holding concern, regardless of stock ownership or the ability of individual stockholders to liquidate their holdings, is required. The sales prices for any number of shares of stock less than a majority interest are not necessarily indicative of the fair value of the entire capital stock. The book value, the kind of assets (slow or quick turning), the nature of the business, good will, franchises, earning capacity, etc., are important factors that affect the worth of enterprises and must be given due consideration in arriving at the fair value at any given date.

In order that consideration may be given the various factors affecting fair value, three exhibits are provided for furnishing information, and the taxpayer will complete each exhibit or state why the required data are not available.

Exhibit A provides for adjusting any overstated or understated values contained in the taxpayer's books of account, and Exhibit C provides for showing an adjusted income, which should be the actual operating income to be used for calculating on a percentage basis fixed by its officers as fairly representing conditions obtaining in the trade and in the locality. If the reconstructed book value shown by Exhibit A or the market value above by Exhibit B is greater than the valuation returned by the taxpayer, a comprehensive statement showing any extraordinary conditions which are relied on in support of the valuation claimed must be submitted. In any case in which the fair value is understated the amount will be redetermined by the Commissioner and the correct tax assessed; also any penalty incurred will be asserted.

2. Closing Date or Fiscal Year.—In item 7, on page 1 hereof, the taxpayer will show the closing date of its fiscal year ended between July 1, 1919 and June 30, 1920. If other than June 30, and the information furnished under Exhibits A, B, and C will be as of the year or years ended on such date, which should be used annually.

Mutual insurance companies will show June 30 or the nearest earlier date of the closing of the preceding accounting period used by such company for purposes of making its income-tax return.

3. Exhibits.—The three exhibits, A, B, and C, are provided to indicate the information desired and the manner in which it should be furnished. So far as adaptable these forms should be completed by taxpayers, but if they find it more convenient they may attach to this return their own statements (as in the case of banks and insurance companies), provided substantially the same information is furnished. In any event, taxpayers should attach any additional statements that will aid in a comprehensive understanding of the taxpayer's return, so that the Commissioner of Internal Revenue may equitably determine the correctness of the fair value reported in Item 17 on page 1 hereof.

4. EXHIBIT A: CONDENSED BALANCE SHEET.—Furnish under Exhibit A a condensed balance sheet as of the closing date of the fiscal year given in Item 7 on page 1 hereof.

"Books of account."—These columns must show the amounts as carried in the taxpayer's books of account.

"Fair value."—Refer to article 1, above, defining the value required, and in the event that the columns "Books of account," contain any overstated or understated values, show herein the actual values.

"Difference."—These columns will show the difference between the columns "Books of account" and "Fair value." Any material differences must be explained in such manner as to enable the Commissioner of Internal Revenue to determine if they are proper and acceptable. For this purpose the differences shown herein need not be covered by corresponding adjustments in the taxpayer's books of account.

"Treasury stock" and "Treasury bonds."—In the event the taxpayer holds in its treasury any of its own stock or bonds, advice must be furnished as to whether such stock and bonds are pledged or unpledged.

"Other assets" and "Other liabilities."—If material amounts are shown, a comprehensive analysis of them must be attached.

"Profit and loss."—If the "Profit and loss" balance is a debit, the amount should be shown in red.

Reserves for the payment of future dividends, whether declared or not, will not be considered as liabilities, but a reasonable amount to cover the preceding dividend period may be so considered if the dividend has been declared and not disbursed.

5. EXHIBIT B: QUOTATIONS ON OVERSEAS STOCK PRICES.—Furnish under Exhibit B the prices quoted on a recognized stock exchange or on the New York Stock Exchange, or the prices at which outside sales were made if the stock is not listed, for the period of 12 months ending with the close of the taxpayer's fiscal year given in Item 7 on page 1 hereof.

GENERAL INSTRUCTIONS

1. Payment of Tax.—The capital stock tax due July 1, 1920, is an excise tax payable in advance for the privilege of doing business from July 1, 1920, to June 30, 1921.

2. Date of Filing Returns.—During the month of July and annually thereafter.

3. TERRITORIAL RETURN.—Filing of a territorial return will avoid penalty for delinquent filing, but does not authorize withholding of the tax. Complete return as far as possible and submit an approximate estimate as a basis in order that an initial assessment may be made. See Art. 54, Reg. 50, Revised.

4. THE COLLECTOR MAY MAKE RETURN.—If any corporation or association fails to make and file a return within the time prescribed by law or by regulation made under authority of law or makes, wilfully or otherwise, a false or fraudulent return, the collector or his deputy is authorized to make the return from such information as he can obtain through testimony or otherwise. Such return, when subscribed by the collector or his deputy, shall be prima facie good and sufficient for all legal purposes.

5. EXTENSION OF TIME.—If on account of sickness or absence of the officer charged with making the return, it is impossible to prepare and file a return on or before July 31, the collector, upon application in writing, may allow an extension of not exceeding 30 days for making and filing the return. If extension is granted, the letter of the collector should be attached to the return.

If the stock is listed, the name of the exchange from which quotations are taken must be shown in the space provided therefor, and quotes reported will be the mean of the highest and of the lowest bid price during each month, from which the average for the year will be obtained. If the taxpayer prefers, a schedule may be attached to this return showing the highest and lowest bid price at which stock was quoted for each day of the year and the average obtained therefrom.

If the stock is not listed and outside sales have been made at prices known or determinable by the officers making this report, such prices will be reported under which sales were made at other than exchange quotations must account for this return. Sales to employees or directors for qualifying purposes, or sales which are restricted as to resale, or sales at prices otherwise specially influenced, will not be considered representative of the fair value of the entire capital stock and should not be included.

In the column "Number of shares outstanding" should be shown the total number of shares outstanding at the close of each month. The average value per share will be determined as follows:

First. If no change occurred in the number of shares outstanding during the year, total the quotations or sales prices for the months reported and divide by the number of months in which quotations or sales prices are shown.

Second. If any change occurred in the number of shares outstanding during the year, total the quotations or sales prices for the months reported during which the number of shares outstanding at the close of the tax has been outstanding and divide by the number of months used in the computation.

6. EXHIBIT C: ANNUAL INCOME.—Furnish under Exhibit C the annual income and other data for the five fiscal years ended with the close of the taxpayer's fiscal year as given in Item 7 on page 1 hereof, or for the period during which the corporation has been engaged in business if for a shorter period.

"Net Income."—In this column will be shown the income returned for the purpose of the income tax and excess profits tax.

"Deductions" and "Additions."—Refer to article 1 of these Special Instructions, and show in these columns such amounts as should be deducted from income and other data for additions and betterments, or reserves for such purposes, made against income, whether direct or through expenses.

"Interest charges not deductible in computing income subject to tax."

"Losses not fully deductible, in computing income subject to tax."

Additions:

Dividends from other corporations not included in computing income subject to tax.

Income from securities of a State, municipality, or of the United States, not included in the income-tax return.

Expenditures made for additions and betterments, or reserves for such purposes, made against income, whether direct or through expenses.

"Number of shares."—Herein should be given the total number of shares of all classes of stock outstanding at the close of each fiscal year.

"Adjusted income."—This column will reflect the amounts resulting from the adjustment of the amounts shown in the three preceding columns.

"Dividends deferred."—Herein should be reported the amount of dividends declared on the par value of each class of stock outstanding each year. The amount represented by the percentages shown in this column must not be deducted from the column "Net income" or "Adjusted income."

"Depreciation."—Hereunder will be reported the amount actually charged against income each year in the taxpayer's books of account for depreciation.

"Depletion."—In the case of mines, oil and gas wells, other natural deposits, and timber, valuations reported as the basis of depletion in computing Capitalized net income.—The officers making the return will capitalize the average annual income on a percentage basis that fairly represents, under the conditions obtaining in the trade in the locality, what representative enterprises must earn in order to maintain their stock at par. In other words, if enterprises engaged in a similar business must on the average earn 12 per cent on their issued capital stock to keep the value of their stock at par, the net income should be capitalized by dividing it by .12.

7. Domestic insurance companies (other than mutual companies) must attach to the return a list of such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection or payment of policyholders, stating the name and amount of each deposit or fund.

8. Domestic mutual insurance companies must attach to the return a statement list showing the nature and amount of each reserve, the net additions to which are included in the net income.

6. SIGNATURE AND VERIFICATION.—Returns must be signed and verified by two officers of the corporation, that is, by the president, vice-president, or other principal officer, and by the treasurer or other financial officer, and must be sworn to before an officer authorized to administer oaths, and the seal of the corporation or the collector or his deputy must be impressed on the return. The name of the corporation and the names of the officers signing the return should be plainly written or printed on the return.

7. TAX.—From the total fair average value of the capital stock the sum of \$5,000 is deductible and the tax is at the rate of \$1 for each full \$1,000 of any balance except in the case of mutual insurance companies (see lines 10 to 20 on page 1).

8. Penalties.—In case of any failure to make and file a return or list within the time prescribed by law, as prescribed by the Commissioner of Internal Revenue or before an officer authorized to administer oaths, and the seal of the corporation or the collector or his deputy must be impressed on the return, after such time and it is shown that the failure to do it was due to a reasonable cause and not to wilful neglect, no such addition shall be made to the tax. In case of a false or fraudulent return or list is wilfully made, the amount of the tax is payable to the collector at any time after July 1, 1920, but penalties for nonpayment do not attach until day after notice and demand has been served by the collector upon the taxpayer. No. 50, Revised.

EXHIBIT A

CONDENSED BALANCE SHEET AS OF
DECEMBER 31, 1945

BOOK VALUE

FAIR VALUE

DRAFT

Land and equipment	8,657	620	28
Less accumulated depreciation	8,722	509	49
Total	2,809	824	72

Inventory	1,815	635	98
Less accumulated depreciation	7,540	593	27

Accounts receivable	61	997	41
Less allowance for doubtful accounts	55	397	25

Accounts payable	5	157	521	86
Less accumulated depreciation	55	397	25	86

FAIR VALUE

DRAFT

Accounts payable	182	356	45
Less accumulated depreciation	453	309	79

Accounts payable	2	475	437	79
Less accumulated depreciation	453	309	79	79

Accounts payable	1	290	755	51
Less accumulated depreciation	453	309	79	79

Accounts payable	1/2	139	369	51
Less accumulated depreciation	453	309	79	79

Accounts payable	15	771	700	20
Less accumulated depreciation	1	505	546	12
Accounts payable	14	329	752	27
Less accumulated depreciation	56	397	337	95

THREE QUARTERS

DRAFT

Accounts payable	22,921	10	15	20
Less accumulated depreciation	5,203	2,912	2,677	2,677

Total assets and accruals after deducting current liabilities and other current assets
Less accrued expenses and liabilities after deducting current assets, except for
taxes and other taxes

25,628
4,169
20,959

etc.

1. Total assets and accruals after deducting current liabilities and other current assets

26,265

2. Total assets and accruals after deducting current liabilities and other current assets

26,265

3. Total assets and accruals after deducting current liabilities and other current assets

26,265

SPECIAL INSTRUCTIONS

for the purpose of this tax the fair value of the entire capital stock as a going concern, regardless of stock ownership or the ability of individual stockholders to liquidate their holdings is required. The sales prices for any number of shares of stock less than a majority interest are not necessarily indicative of the fair value of the entire capital stock. The book value, the kind of assets (slow or quick turning), the nature of the business, good will, franchises, earning capacity, etc., are important factors that affect the worth of enterprises and must be given due consideration in arriving at the fair value at any given date.

If the stock is listed, the name of the exchange from which quotations are taken, should be shown in the space provided therefor, and the prices reported will be the mean of the highest and of the lowest bid price during each month from which the average for the year will be obtained. If the taxpayer prefers, a schedule may be attached to this return showing the highest and lowest bid price at which stock was quoted for each day of the year and the average obtained therefrom.

number of shares outstanding at the close of each month by share will be determined as follows:

First. If no change occurred in the number of shares outstanding during the year, total the quotations or sales prices for the months reported and divide by the number of months in which quotations or sales prices are shown.

Second. If any change occurred in the number of shares outstanding during the year, total the quotations or sales prices for the months reported during which the number of shares outstanding at date of incidence of the tax has been outstanding and divide by the number of months used in the computation.

6. EXHIBIT C: ANNUAL INCOME.—Furnish under Exhibit C, the annual in-

"Net Income":—In this column will be shown the income returned for the corporation's fiscal year as given on page 7 or for the period during which the corporation has been engaged in business if for a shorter period.

Purpose of the income tax and excess profits tax.

"Deductions" and "Additions." Refer to article 1 of these Special Instructions, and show in these columns such amounts as should be deducted from or added to "Net Income" to arrive at the adjusted income which may be capitalized.

Deductions: A deduction is admissible in computing income subject to taxation to determine the fair value of the capital stock. A comprehensive analysis of all amounts reported therein should be attached to this return. Some of the principal items frequently requiring adjustment are:

Income and profits taxes not deduction in computing income subject to tax.
Depreciation and depletion.
Interest charges not deductible in computing income subject to tax.
Losses not fully deductible, in computing income subject to tax.

Dividends, from other corporations not included in computing income subject to tax.
Income from securities of a State, municipality, or of the United States,
Not included in the income-tax return.

"Adjusted Income."—This column will reflect the amounts resulting from the adjustment of the amounts shown in the three preceding columns.

*"Number of shares"—*Hevin should be given the total number of shares or all classes of stock outstanding at the close of each fiscal year.
*"Dividends declared"—*Hevin should be reported the percentage of dividends declared on the par value of each class of stock outstanding each year. Hevin should also report the percentage of each class shown in this column must not be greater than 100%.

The amount represented by the percentage shown in the column must be deducted from the column "Net Income" or "Adjusted Income."

Depreciation.—In the case of mines, oil and gas wells, outer natural deposits, and timber, valuations reported as the basis of depletion in computing Federal income and profits taxes should be shown in the "Fair value" column.

Capitalizing net income.—The officers making the return will capitalise the average annual income on a percentage basis that fairly represents under the

average annual income of persons engaged in agriculture, the conditions obtaining in the trade in the locality, what representative enterprises must earn in order to maintain their stock at par. In other words, if enter-
prises engaged in a similar business must on the average earn 12 per cent on
their issued capital stock to keep the value of their stock at par, the net income

should be capitalized by dividing it by .12.

to or apportionment among policyholders, stating the name and amount of each such deposit or fund.

GENERAL INSTRUCTIONS

1. **NATURE OF TAX.**—The capital stock tax due July 1, 1920, is an excise tax payable in advance for the privilege of doing business from July 1, 1920, to June 30, 1921.
2. **DATE OF FILING RETURNS.**—During the month of July and annually thereafter.
3. **TENTATIVE RETURN.**—Filing of a tentative return will avoid penalty for delinquent filing, but does not authorize withholding of the tax. Complete return as far as possible and submit an approximate estimate as a basis in order that an initial assessment may be made. See Art. 24, Reg. 56, revis.
4. **THE COLLECTOR MAY MAKE RETURN.**—If any corporation or association fails to make and file a return within the time prescribed by law or by regulation made under authority of law, or makes, wilfully or otherwise, a false or fraudulent return, the collector or his deputy is authorized to make the return from such information as he can obtain through testimony or otherwise. Such return, when subscribed by the collector or his deputy, shall be prima facie good and sufficient for all legal purposes.
5. **EXTENSION OF TIME.**—If on account of sickness or absence of the officer charged with making the return it is impossible to prepare and file a return on or before July 31, the collector, upon application in writing, may allow an extension of not exceeding 30 days for making and filing the return. If extension is granted, the letter of the collector should be attached to the return.

The fair value of the Capital Stock determined by Exhibit "B" is used for the computation of the tax since such sales, made in substantial volume in a free and open market, represent the "fair average value of the Capital Stock for the preceding year." The law makes this the measure of the tax and this corporation respectfully urges that a calculation, such as is made in Exhibit "B", based upon bona fide transactions on a large scale in an open market, establishes the value of its Capital Stock for the purpose of this tax.

The book figures as stated on Exhibit "A" do not include the valuation used as the basis of depletion in computing Federal Income Taxes. This valuation as determined by the Department was as of March 1, 1913, and the conditions existing at that date were materially different from those which existed during the year just closed. Such valuation also was under a different statute reading "the fair market value of the property." For these reasons, as well as because of the better basis furnished by Exhibit "B", the valuation placed on the property for the purpose of depletion is not used as a basis for the Capital Stock Tax.

In stating the net income in Exhibit "C" the figures for the years 1915, 1916 and 1917 have been stated on the basis of the taxable income for those years as restated by the Department as a result of its audit of the Company's tax returns.

In the column headed "Deductions" the amounts stated are the amounts of taxes (Income and Excess Profits) as now assessed or reassessed by the Department. In 1918 there were also donations to Red Cross and War Work Funds which are not deductible on the tax returns.

The additions consist of non-taxable income.

The resulting balance is stated as Adjusted Income although such adjusted income exceeds the income shown by the books for those years by the amount of disallowances made by the Department.

The average annual income as thus determined is shown as capitalized at 12% which we believe to be a fair return to be figured for property of this class under the conditions which existed during the past year. During the year Government tax-exempt bonds have been selling at a 5% to 6% basis, high grade industrial bonds have been selling on a 7% to 8% basis, and it is therefore believed that a fair return on the stock of this Company under such conditions would be not less than 12%.

This gives substantially the same valuation as that shown in Exhibit "B". As Exhibit "B" reflects more accurately "the fair average value of the Capital Stock for the preceding year" as contemplated by the Capital Stock Tax Law, the return herewith is presented on the basis of the valuation there shown.

In addition to the "Dividends Declared" in 1917 of \$3.70 there was a "Capital Distribution" of 50¢ per share. In 1919 there were Capital Distributions of \$2.00 per share.